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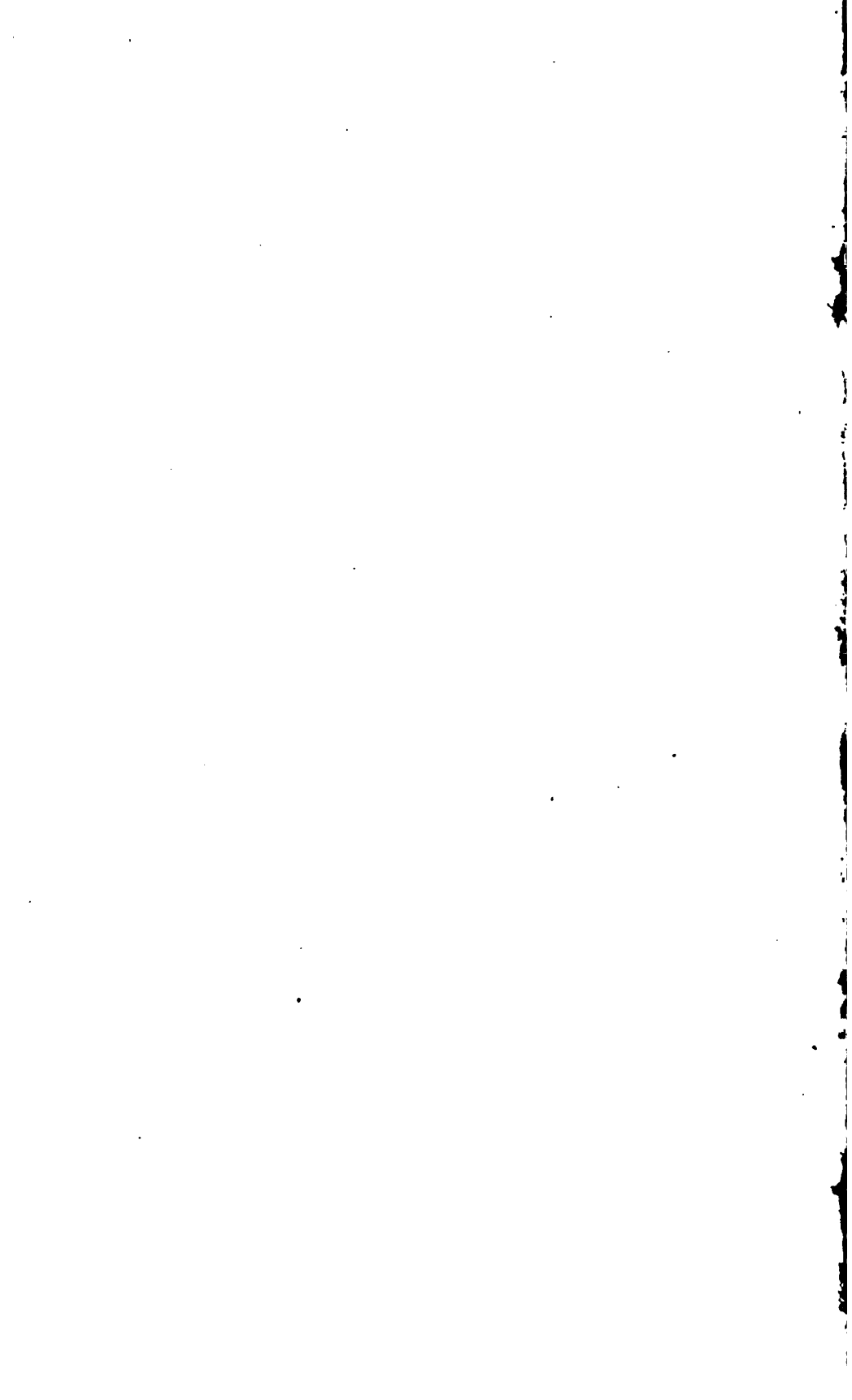
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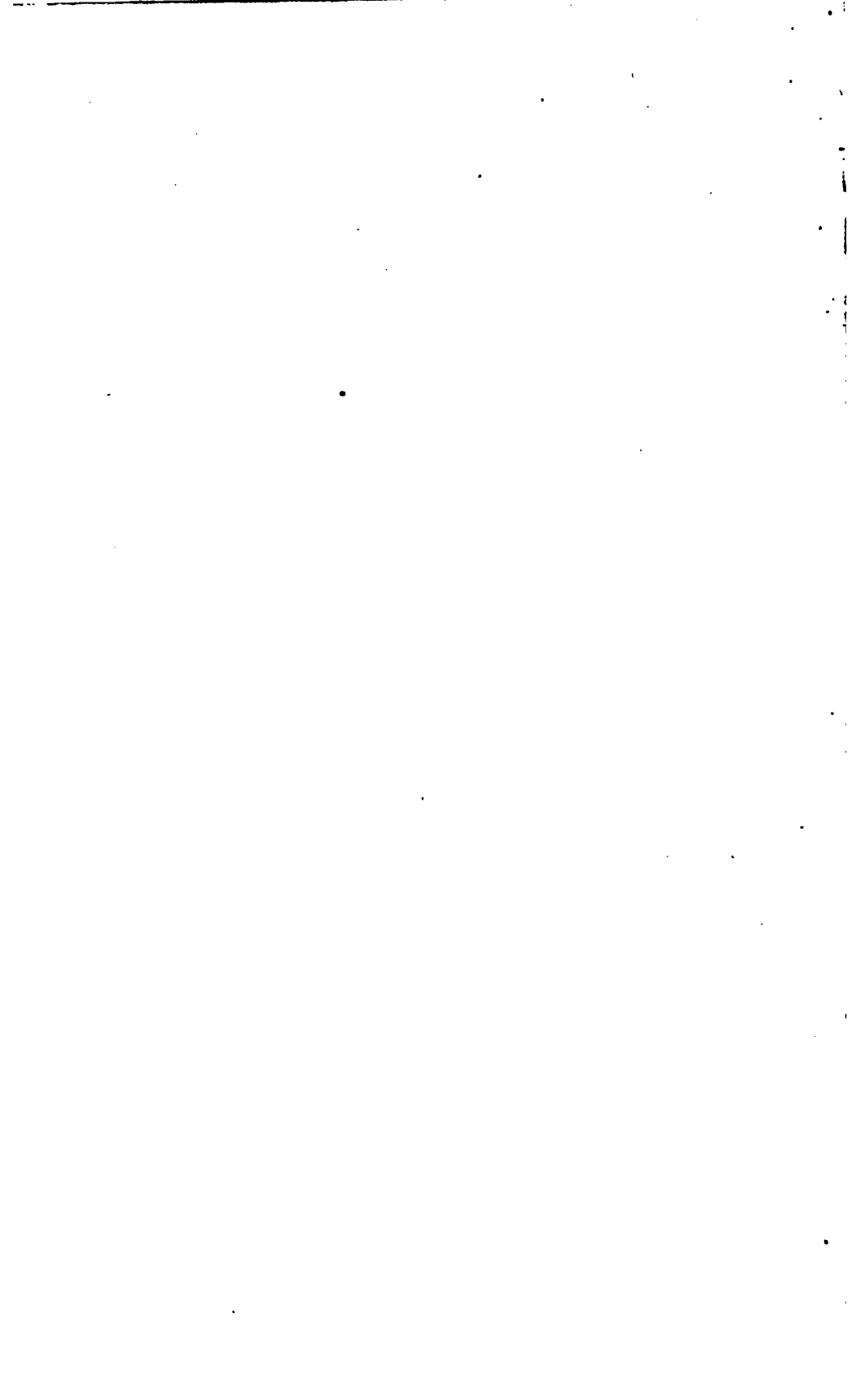
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18

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF APRIL 10, TO AND INCLUDING
DECISIONS OF JUNE 5, 1894.

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXLII.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING APRIL 10, 1894.

WILLIAM W. GILMORE, Appellant, v. EDWARD E. HAM,
Respondent.

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The provision of the Code of Civil Procedure (§ 388) declaring that "an action, the limitation of which is not specially prescribed, * * * must be commenced within ten years after the cause of action accrues," applies to any and every form of equitable action.

Miner v. Beckman (50 N. Y. 343); *Schoener v. Lissauer* (107 id. 117), distinguished.

Where a partnership is dissolved by mutual consent, and one of the co-partners is appointed liquidator, the duty imposed upon him is one of agency. No new authority is given to him and no direct trust is created, but the authority the partnership conferred continues, limited, however, so as to include only that which is necessary for a settlement of the business.

A right of action in favor of the retiring against the liquidating partner for an accounting does not accrue at the time of the dissolution; nor is it postponed until the last item of partnership business is settled and closed. The liquidator is bound to be diligent, and where there has been a needless delay equity may interfere.

The right of action, therefore, accrues, and the Statute of Limitations begins to run against it when, under the circumstances of the particular case, the liquidating partner has had a reasonable time within which to perform his duty, and so is in fault for not fully completing it.

In an action for an accounting and contribution between co-partners, brought in 1890, it appeared that in 1869 plaintiff abandoned the partnership and left the state. Defendant shortly after published a notice of the dissolution of the firm, and that he would close its affairs. In

1871 defendant sold out and received his pay for the partnership stock of goods then in his possession; he paid the firm debts, except one note, and he had ample assets in his hands to pay that. An action was brought upon this note in 1886; plaintiff alone defended; as the Statute of Limitations did not protect him because of his continued absence from the state, judgment was rendered against him and he was compelled to pay the full amount of the note and accrued interest. *Held*, that judgment was properly rendered against defendant, in accordance with the prayer of the complaint, for contribution of one-half the amount so paid by plaintiff; but that the cause of action for an accounting was barred by the statute; that the case was to be considered as if the partnership had been dissolved by mutual consent and defendant appointed the liquidating partner, and when in 1871 he turned the firm assets into money his duty required payment by him of all the firm debts, and the cause of action for an accounting then accrued and the statute began to run.

It seems, that even in the case of a direct trust, the Statute of Limitations begins to run when the trust ends, and the trustee has no longer a right to hold the trust fund or property, but is bound to pay it over or transfer it, discharged from the trust.

Hendy v. March (75 Cal. 567); *Hammond v. Hammond* (20 Ga. 560); *Prentice v. Elliott* (72 id. 156); *Riddle v. Whitehill* (185 U. S. 621), distinguished.

(Argued February 28, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought in 1890 for an accounting and contribution between partners.

The facts, so far as material, are stated in the opinion.

T. K. Fuller for appellant. The Statute of Limitations is no defense in this case. (*Riddle v. Whitehill*, 135 U. S. 621; *Gray v. Green*, 125 N. Y. 203, 208; *Purdy v. Sistarac*, 2 Hun, 126; *Angell on Lim.* §§ 166, 167, 178; *Drake v. Wilkie*, 30 Hun, 537; *People v. White*, 28 id. 289, 293; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Patridge v. Wells*, Id. 176; *Prentice v. Elliott*, 72 Ga. 154; *Hammond v. Hammond*, 20 id. 556;

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Massey v. Tingle, 29 Mo. 437; *McClung v. Capehart*, 24 Minn. 17; *Hendy v. March*, 75 Cal. 566; *Foster v. Rison*, 17 Gratt. 321; *Tatam v. Williams*, 3 Hare, 347, 358; *Causler v. Wharton*, 62 Ala. 358; *Cannon v. Copeland*, 43 id. 201; *Adams v. Taylor*, 14 Ark. 62; *Lawrence v. Rokes*, 61 Maine, 38.) A liquidating partner, made such either by law or by contract, cannot plead the Statute of Limitations in his own favor, until he completes the liquidation. (*Gray v. Green*, 125 N. Y. 203, 208; *Purdy v. Sistare*, 2 Hun, 126; *People v. White*, 28 id. 289, opn. 293; Angell on Lim. §§ 173, 179, 180; *Drake v. Wilkie*, 30 Hun, 537; *Causler v. Wharton*, 62 Ala. 358.) The court erred in refusing to charge that the circumstances of this case are such as to render it unjust, inequitable and against good conscience to allow the defendant's plea of the Statute of Limitations, as a bar to an accounting between the partners in their suit in equity. (*Sterndale v. Hankinson*, 1 Sim. 398; *Ault v. Goodrich*, 4 Russ. 434; *Robinson v. Field*, 5 Sim. 14.) Even if the judgment for contribution had been paid, still this appeal would lie. (*Clowes v. Dickenson*, 8 Cow. 328; *Dyett v. Pendleton*, Id. 325; *Benkhard v. Babcock*, 17 Abb. Pr. 421; *Higbee v. Westlake*, 14 N. Y. 281; *Barker v. White*, 58 id. 204; *Genet v. Davenport*, 60 id. 194.)

John C. Hunt for respondent. If the time has elapsed so that the statute bars an action for an accounting, and the statute is pleaded, it is fatal. (*Gray v. Green*, 125 N. Y. 203.) Plaintiff within ten years after dissolution could have filed a bill for an accounting in which action the assets would have been marshalled and the debts paid from the proceeds, or if not sufficient to pay, each co-partner would have been adjudged to pay as found due. (*Butler v. Johnson*, 111 N. Y. 205; *Still v. Holbrook*, 23 Hun, 517; Code Civ. Pro. § 388; *Calhoun v. Millard*, 121 N. Y. 69.)

FINCH, J. Under what circumstances and from what date the Statute of Limitations runs in favor of a liquidating partner as against the retiring partner suing for an accounting and payment of his share, is the question presented on this appeal.

That it is a troublesome and perhaps difficult inquiry is obvious from the varying and shifting circumstances upon which it may arise, and still more from a study of the conflicting decisions which have striven by very different methods to reach a definite solution of the problem. That it has some degree of importance and should be determined carefully is apparent from the fact that it must necessarily settle when the cause of action for an accounting accrues and can be enforced, and so when the liquidating partner is in default. It is desirable to state first, as definitely as possible, the facts upon which the question arises.

Ham and Gilmore became partners in the clothing business in March of 1864, and conducted the business until June, 1869, when Gilmore went away and left the state. Ham says he "absconded," and claims that previous to his departure he had been secretly disposing of the partnership goods for his own benefit, and disappeared to avoid detection. Whether that be true or not, we must assume that Gilmore abandoned the partnership, and that his action amounted to a consent to its dissolution, and the appointment of Ham as the sole liquidating partner, authorized to settle the partnership affairs. For, shortly after Gilmore's departure, Ham published a notice of the dissolution of the firm and that he would close its affairs, and Gilmore's assent is to be inferred not only from his conduct at the time, but from his long silence and from his adoption of Ham's action involved in the institution of the present suit. We are to treat the case, therefore, precisely as if there had been a dissolution by mutual consent, and Ham had been appointed the liquidating partner alone authorized to close up the business. He took that attitude; was allowed to take it; received and held all the assets; and assumed rightfully the duty of winding up the partnership affairs. What he did in that direction we know very imperfectly because he chooses not to render an account. It appears, however, that in 1871 he sold out and received his pay for the whole stock of goods then in his possession and which must have covered the entire assets of the dissolved firm, except,

perhaps, its bills receivable. The latter, so far as collectible, we may and should assume had been collected during the two years which had elapsed since the dissolution. As to the debts owing by the firm and payable out of its assets, we have only the statement of Ham that at the date of his sale of the stock of goods he had paid "a good many" of the debts of the firm, but did not know whether he had paid them all. One, at least, he had not paid. That was a note given by Ham & Gilmore to the wife of the former, for \$675, dated December 19, 1866, and payable one day after date. That note might have been and should have been paid in 1871 when the liquidating partner had turned all the assets into money, and, as the case shows, had ample means of the partnership in his possession adequate to that payment, and his omission to pay it was a clear violation of his duty. I am confident that, at that date, two years after the dissolution, when all the assets had been turned into money, when most of the debts had been paid, and when all of them ought to have been paid, the retiring partner could have maintained an action against the liquidating partner for an accounting of the partnership affairs and payment over of the share ascertained; and that it would not have been a defense to the suit that the retiring partner's cause of action had not accrued because one or more debts had been needlessly left unpaid. This conclusion, however, is adverse to some of the decisions, and will need consideration at a more convenient stage of the discussion.

What further happened was this: The note held by Mrs. Ham was sued in 1886, about twenty years after its maturity: service was made on Gilmore, who alone defended: the Statute of Limitations did not protect him because of his continued absence from the state: judgment went against him and he was compelled to pay the full amount of the note, with its accrued interest: and thereupon he commenced this action. It has two phases. The complaint, alleging the compulsory payment of the note, demands contribution from Ham of the one-half chargeable against him, and for that there has been a recovery. Whether, upon proper allega-

tions, there might not have been a judgment for the whole amount paid need not be considered since no such claim was made and no such relief was asked. The further cause of action pleaded was for an accounting of the partnership affairs and payment of the share found due, and to that the defendant pleaded both the six-year and the ten-year limitation, and has succeeded. The plaintiff appeals and insists that he is entitled to an accounting, notwithstanding the lapse of time, and mainly upon the ground that the statute did not begin to run until all the business of the partnership was settled up and ended, for which contention he furnishes more or less of authority.

Under the law of this state there is a fixed limitation for every cause of action, whether legal or equitable. After attaching suitable limitations to numerous classes of actions the Code adds (§ 388): "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues." This provision, in the Code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. (*De Pierres v. Thorn*, 4 Bosw. 288, 289; *Loder v. Hatfield*, 71 N. Y. 104.) So far as I have examined the authorities in this state since the adoption of the Code I have found no denial of the application of its provisions to any form of equitable action, unless cases of a continuing right, accruing newly every day, may be said to form an exception (*Miner v. Beekman*, 50 N. Y. 343; *Schoener v. Lissauer*, 107 id. 117), although it is quite apparent that they are not inconsistent with the uniform and universal rule. They serve, not to break it, but to show how difficult it occasionally is to determine when the right to the equitable relief arises, and when the cause of action so accrues as to set running the appropriate limitation. I shall assume, therefore, that either the six-year or the ten-year limitation applied to the plaintiff's cause of action, and need not for present purposes determine which.

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When, then, did the plaintiff's cause of action accrue, for that is the date from which the limitation begins to run, and which we must fix in some manner in order to reach a result. I said in *Gray v. Green* (125 N. Y. 206) that when an action is brought against a liquidating partner for an accounting the plaintiff must wait a reasonable time after the dissolution before his right of action can at all accrue, and, while the statement was not then essential to the decision, a further examination of the question in the present case has served to confirm that opinion. A cause of action originates in some violation of a legal duty or some omission to perform it. The duty imposed upon the liquidator is one of agency. He becomes the sole authorized agent of the partnership for the single purpose of winding up and finally settling its affairs. There are elements of trust in his position and duty which lead us often to regard and describe him as a trustee for the creditors on the one hand or the retiring partner on the other, and the description is not inappropriate so long as it does not mislead us into the error of regarding the position and duty of the liquidator as that belonging to a direct trust. His authority is not such. No new authority is given to him. What he has is a restricted and narrowed part of that which the partnership conferred. That continues and subsists to the extent necessary for a settlement of the business, and is not a new authority or a direct trust. (*Kane v. Bloodgood*, 7 Johns. Ch. 90; *Adams v. Taylor*, 14 Ark. 66.) The liquidator becomes the agent of the partnership for the one specific purpose. His duty is to collect and adjust the debts due to the firm, to turn the assets into money, to pay and discharge the outstanding liabilities and then to pay over to the other partner his just share of the remaining surplus. (Story on Partnership, § 328.) But he must perform this duty with reasonable diligence (*Evans v. Evans*, 9 Paige, 180), and while so acting, and in good faith, equity will not interfere and no cause of action in favor of the retiring partner can or will arise. Obviously, such a cause of action will accrue, not at once upon the dissolution, but at some later period when there

has been such violation or neglect of duty as to justify equitable interference.

While, therefore, it is clear that the cause of action for an accounting does not arise at the moment of the dissolution, it is not necessarily postponed to the other extreme of a complete and final ending of all the partnership business. That view is taken in some of the adjudged cases (*Hendy v. March*, 75 Cal. 567; *Hammond v. Hammond*, 20 Ga. 560), but I do not think it is intended to be asserted as an absolute rule, always applicable irrespective of circumstances. Indeed, in *Prentice v. Elliott* (72 Ga. 156) it is again stated, but with the qualification that the statute might begin to run when "a sufficient time had elapsed to raise the presumption" that the business had been fully settled. If by these cases and others like them it is only meant to say that a final share cannot be recovered until it is ascertained and exists, and that the liquidator, doing his duty diligently and in good faith, will not be disturbed until the surplus is ready for distribution, we may and should concur in it as a general proposition. I think that, and no more than that, is meant by the opinion of the Federal court in *Riddle v. Whitehill* (135 U. S. 621) which is cited in support of a much broader doctrine. It holds that the right of action for an accounting does not arise at the date of the dissolution; that it does not accrue at all while the liquidator is doing his duty without antagonism between the partners or cause for judicial interference; and that when the right of action accrues and the statute begins to run "depends upon circumstances." I see no reason to doubt the accuracy of that doctrine, and am content to follow it as I have stated it.

We must, therefore, avoid the two extremes, which are that the statute begins to run at the date of the dissolution, and does not begin to run until the last item of partnership business is settled and closed: and determine when and how it may attach during the interval. The liquidator is bound to be diligent. He violates his duty when, without cause or reason, he prolongs the period of settlement. He is not at liberty, through negligence or purposely, to keep the retiring partner

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or the representatives of one deceased out of their rights, or needlessly to postpone the ultimate distribution. If he does that equity may interfere, and, if no other measure will answer, may take the settlement into its own hands. I think, therefore, the right of action for an accounting accrues when the liquidator, under the circumstances of the particular case, has had a reasonable time within which to perform his duty, when it ought to have been fully completed, and when the liquidator is in fault if it is not. It cannot be and must not be that he may stretch the period of settlement at his will, and, leaving one or more debts unpaid, hold the assets in the peril of his continued solvency through long years, defying all equitable redress. I should be glad if it were possible to adopt some more definite rule than the one I have stated, but only specific legislation can give us that. Meantime, in each specific case, taking into consideration all the attendant circumstances, we must determine when the cause of action accrues.

In the present case that is not difficult. Ham's duty as liquidator was simple and easy. There were no complications to hinder or delay it. The goods could be sold, the accounts be collected and the debts be paid within two years from the date of the dissolution, which is a longer period than that allowed an executor or administrator before he becomes liable to account. Within that period the assets were in fact sold; the debts due to the firm presumably collected; its liabilities all paid except the note to Mrs. Ham; and that was due and should have been paid, and its further postponement was a negligent or intended violation of duty. I have not the least doubt that Gilmore's right of action for an accounting and a recovery of his share of the surplus accrued at that date, and could have been successfully maintained. Since almost twenty years elapsed from that date before the present action was commenced it is clear that the statute is a defense and has barred the right.

There are some answers to that conclusion which demand further consideration. One of them is founded upon the doctrine applicable to trusts that the statute does not run

upon them until they are openly repudiated by the trustee. Without pausing to consider the scope and limitations of that doctrine, it is enough for present purposes to repeat what I have already said, that the agency of the liquidator is not a direct trust, and the rule asserted applies only to such. In *Lammer v. Stoddard* (103 N. Y. 672) we described the doctrine as applicable against a trustee of an actual, express and subsisting trust, but held that where the trustee became such by implication or construction the statute ran from the date of the wrong which raised the implication. It may be added that even in the case of a direct trust the statute will begin to run when it ends, and the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over or transfer it discharged from the trust.

A further answer is found in the suggestion that whatever may be the right of the retiring partner to sue for an accounting the liquidating partner cannot avail himself of the statute until he has completed the liquidation. The argument is that the law gives him a reasonable time; that if he takes more or is allowed to take more he, at least, cannot complain; and that the statute does not mean to reward his negligence nor punish the grace of his co-partner. The trouble about this argument seems to me two-fold. It disregards the mandate of the enactment which makes the date of the accruing of the cause of action the point of time from which the statute begins to run, and substitutes an entirely different and inconsistent date. We have no right to disregard the plain terms of the law, but must obey them as well as we can. And to the further idea that it was not intended to reward the negligence of the liquidator or enable him to take advantage of his own wrong, the obvious answer is that the doctrine would repeal the statute in every case. He who pleads the statute is always taking advantage of his own wrong in the sense that it is invariably his own default, his neglect or wrongful act, which originates a cause of action against himself and so sets the Statute of Limitations running. The law does not intend to reward one or punish the other, but goes upon a broad ground

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Statement of case.

of public policy which aims to end litigation within periods which are fair and just to both parties. On the one hand the liquidator must act promptly and diligently and not seek to drag the settlement out through long years for his own convenience or in disregard of the rights of his co-partner; and on the other the latter must not sleep on his rights, and wait till books are lost, or vouchers mislaid, or witnesses dead, before seeking an accounting and payment.

While it would not displease us to compel this defendant to account, we must refuse to do so in obedience to the law.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

**PETER J. FLINN, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

A railroad company may not be made liable for the unavoidable or usual consequences to adjacent property of the proper operation of its road.

Where a building upon adjacent property is destroyed by fire, caused by sparks escaping from passing engines, to make the company liable for the loss, negligence in the management or condition of the engines must be proved.

It is the duty of the company to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; but this duty is limited to such contrivances as have been tested and put in use. The company is not bound at once to introduce a new appliance which it is claimed will have the effect to make its engines safer in the respect mentioned; it is entitled to a reasonable time for trial and experiment, and to make the necessary changes.

In an action to recover damages for injuries to and the final destruction of a building on plaintiff's premises which adjoined defendant's road these facts appeared: In 1874 defendant laid down a new track, which came within about three and a half feet of plaintiff's building. There was a steep grade in defendant's road where it passed plaintiff's lot, and engines, because of the heavy pull in drawing the trains up it, emitted large quantities of cinders and sparks; these frequently set fire to the building, and in 1884 it was destroyed by fire thus started. It did not appear that the fires were caused by any defects in said engines, and up to 1880 it was undisputed that defendant used upon its engines the

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most approved spark arresters; there was a regular system of daily inspection of the smoke stacks and spark arresters, and if defects were discovered they were at once repaired. In 1880 a new spark arrester begun to come into use which reduced the number of escaping sparks. Defendant had, prior thereto, begun to use it in its freight engines, and had kept on altering them, and before the trial of the action the new system was in general, but not universal use. Defendant, after 1880, had a large number of engines in use. *Held*, the evidence did not justify a verdict for plaintiff; that defendant could not be charged with negligence in not fully introducing the new system of arresting sparks upon all of its engines previous to the fire, in the absence of evidence that it was reasonably practicable and possible so to do.

Flinn v. N. Y. C. & H. R. R. Co. (67 Hun, 631), reversed.

(Argued March 20, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action, and the facts, so far as material, are stated in the opinion.

Matthew Hale for appellant. Defendant was not liable for any damage done to adjacent property unless it was proved that such damage was occasioned by the negligence of defendant or its servants. It was not liable for any incidental damages occasioned by the lawful operation of its road. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Conklin v. N. Y. C. & W. R. Co.*, 102 id. 107; *Rauenstein v. N. Y. L. & W. R. Co.*, 136 id. 528; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *P., etc., R. R. Co. v. Hendrickson*, 80 Penn. St. 182; *P., etc., R. R. Co. v. Shultz*, 93 id. 341; *McCraig v. E. R. Co.*, 8 Hun, 599; *Collins v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 243.) Upon the proof the jury had no right to find that the engines of defendant had caused the injury. (*McDermott v. N. Y. C. & H. R. R. Co.*, 8 Wkly. Dig. 531.) The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence

of the negligence and unskillfulness of the defendant is not sufficient. (*Searles v. M. R. Co.*, 101 N. Y. 661, 662; *Grant v. P. & N. Y. R. Co.*, 133 id. 657.) Railroad companies are not required to use any appliances which have not been tested, although approved by the highest scientific authority, but are required to use only those which have been tested and put into general use. (2 Wood's Railway Law, chap. 19, § 326; *Steinweg v. E. R. Co.*, 43 N. Y. 123; *Babcock v. F. R. Co.*, 140 id. 318.) It was incumbent upon plaintiff to show not only that the sparks came from defendant's engines, but that the injuries of which he complained were occasioned by the negligence of the defendant in not using the proper and sufficient means, and such as were in ordinary use for arresting the sparks. The maxim *res ipsa loquitur* has no application to the case. (*Wiedmer v. N. Y. E. R. Co.*, 114 N. Y. 462; *Cosulich v. S. O. Co.*, 122 id. 118; *Reiss v. N. Y. S. Co.*, 128 id. 103, 107.) The court erred in submitting to the jury the question whether defendant was negligent in not using a different smoke stack from what it did use. (*Babcock v. F. R. Co.*, 140 N. Y. 308.) How long and how heavy a train should be must be a matter for the railroad to decide, and the mere fact that trains were long and heavy, and needed two engines, could be no evidence of negligence. (58 Hun, 233, 234.) The court erred in charging the jury, at the request of plaintiff's counsel, that they were to determine what was the intrinsic value of the property that was destroyed, if they could find any evidence in the case as to what the intrinsic value was. (*Fox v. Phelps*, 17 Wend. 393; *Brown v. Hoburger*, 52 Barb. 15, 24; *Smith v. Griswold*, 15 Hun, 273; *Van Rensselaer v. Mould*, 48 id. 396, 401.)

E. Countryman for respondent. The evidence clearly justified the charge of negligence against the defendant. (2 S. & R. on Neg. § 668; *Vaughn Case*, 5 H. & N. 679; *Jonas Case*, L. R. [3 Q. B.] 733.) It was negligence in the defendant to build the easterly track so near to the line of the avenue, and so close to the plaintiff's building. (*Vaughan v. Menlone*, 3

Bing. [N. C.] 468; *Filliter v. Phifford*, 11 A. & El. 347.) It was clearly, however, gross negligence to move heavy trains up the grade on the easterly track so near the adjoining buildings, without using the safest and most approved spark arresters on the locomotives—especially such as were then in use on its passenger engines. (*Caldwell Case*, 47 N. Y. 282; 2 S. & R. on Neg. § 672.) A *prima facie* case of negligence for the jury was clearly proved against the defendant when it was shown that the locomotives while moving up the grade with heavy trains, and especially when, as frequently happened, they were unable with one at either end, to pull or push the trains forward, vomited forth from their smoke stacks large quantities of sparks and coals, some of the latter as large as walnuts, throwing them in every direction upon the adjoining property and setting the buildings on fire. (*O'Neill Case*, 115 N. Y. 579; *Taunn Case*, 108 id. 624; *Webb Case*, 49 id. 421.) It was unnecessary to identify the particular engines that set the fire. (*Bevier Case*, 13 Hun, 254; *Johnson Case*, 54 Fed. Rep. 475, 476.) Even though all needful appliances are used for the retention of sparks, the company will still be liable, if by overcrowding the engine the escape of sparks and fire is produced to a dangerous extent, resulting in damage or destruction to property. (2 S. & R. on Neg. § 674; *Pindar Case*, 53 Ill. 447.) While the burden of showing negligence on the part of the defendant occasioning the injury rests, in the first instance, upon the plaintiff, proof that the injury was a result which would not ordinarily have happened had the machinery been in proper condition and operated with proper care is sufficient, and the burden then rests upon the defendant to prove that the injury was caused without its fault. (*Seybolt Case*, 95 N. Y. 562, 563; 2 S. & R. on Neg. § 676; *Case v. N. C. R. Co.*, 59 Barb. 644; *Field Case*, 32 N. Y. 339; *Reese Case*, 85 Ala. 497; *Goyette Case*, 132 Ill. 22.) The proof was abundant to warrant the jury in finding that the fires were caused by the defendant's locomotives. The plaintiff was not guilty of contributory negligence. The rule of damages was correct.

(*Uline Case*, 101 N. Y. 99; *Pond Case*, 112 id. 186; *Colrick v. Swinburne*, 105 id. 503; 1 Sedg. on Dam. [8th ed.] §§ 243, 250, 252.) The jury had a right, in their discretion, to add interest to the rents lost for six years, and the value of the building finally destroyed in 1884, on the trial. (*Wilson v. Troy*, 135 N. Y. 96; *Walrath v. Redfield*, 18 id. 458, 462; *Parrott Case*, 46 id. 361, 369; *Moir's Case*, 89 id. 499, 507.) The evidence of the practice of defendant's servants in knocking holes in the netting over the smoke stack, the mode of operating the locomotives, and the results in the way of throwing sparks and coals and causing fires to property along the track, was proper. (*Richardson Case*, 91 U. S. 454; *Hinds v. Barton*, 25 N. Y. 544; *Steele Case*, 74 Cal. 323; *Hoyt v. Jeffers*, 30 Mich. 181.)

EARL, J. This is an action commenced December 2d, 1884, to recover damages for the injuries to and destruction by fire of the plaintiff's wooden dwelling house situated upon his lot adjoining the defendant's railroad in the city of Albany in the preceding August.

About 1844 a railroad company, to whose rights and property the defendant succeeded, constructed upon a strip of land belonging to it a railroad with two tracks, and in 1874, some years after the defendant had become the owner of the railroad and strip of land, it constructed two more tracks, one upon each side of the other two, and the four tracks became a part of its general railroad system.

The house destroyed was built soon after the construction of the first railroad upon the rear end of the lot adjoining and facing the railroad, the front of the lot being upon Broadway. Prior to 1874 the northerly track of the railroad came within about twelve feet from the house, and thereafter it came within about three and one-half feet.

The plaintiff purchased his lot in 1867, and at that time the house was tenantable and was rented for sixteen dollars per month, and continued so rentable until sometime after 1874. After that time the sparks from the engines of the defendant's

road frequently set fire to the house and were so annoying and troublesome that after about 1880 the plaintiff was unable to rent the house and it remained vacant until it was destroyed by fire.

There can be no controversy about the principles of law applicable to this case. The defendant was operating its road under lawful authority past the plaintiff's lot upon its own land, and, therefore, it could not be made liable for the destruction of the house upon the adjoining lot except upon proof of negligence in the management or condition of its engines. The action in such a case is based upon negligence, and a railroad company cannot be made liable for the unavoidable or usual consequences of the proper operation of its road to adjacent property. The law is well stated in an extract found in the brief of the plaintiff's counsel from *Pierce on Railroads*, 433, as follows:

"The duty of the company to use reasonable care in order to avoid injury resulting to others from the exercise of its powers requires it to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; and it is liable for injuries caused by its omission to use them. Its duty in this respect is limited to such contrivances as have been already tested and put in use, and it is not required to use every possible contrivance, although already patented and recommended in scientific discussions."

Now, what are the facts here bearing upon the defendant's negligence? There is no evidence and no claim that prior to 1880 the defendant did not use upon its engines the most approved spark arresters. It used the diamond smoke stack which was in universal use on all railroads. There was no evidence that any engine was out of repair. On the contrary, the evidence shows that there was a regular system of daily inspection of the smoke stacks and spark arresters upon the engines in use, and that they were at once repaired when any defects were discovered. Where the railroad passed this lot

there is a steep grade ascending to the westward, and engines drawing trains there were obliged to labor, and sometimes they made headway slowly and with difficulty, and on account of the heavy grade and hard pull they emitted a large amount of smoke and cinders. The only evidence (I am now speaking of the time prior to 1880) from which the plaintiff can claim to infer negligence is the great emission of sparks and the setting of the fires thereby. But the emission of the sparks was continuous and from all engines on account of drawing heavy trains, and thus there could be no claim that any particular engine was defective unless they were all defective, and that is not claimed. On this subject the plaintiff testified as follows: "The showers of sparks and smoke would be thrown into the windows, if they were open in warm weather, and set fire to the carpets; I am speaking what they did; the effect was still greater if they did not pass readily; if they were lodged there, because it was up grade, and the trains would sometimes become stalled; impossible for the locomotives to do their work, and then if the locomotives were lodged in front of that building showers of sparks would be thrown all about, and if it were dry weather the building would take fire, and sometimes when it was not dry it would take fire; the entire roof and alley and all about there would be flooded with these live coals; this state of things continued about ten years. The final result was that the house was destroyed; these fires continued from 1874, the time the additional track was laid, until the destruction of the building by one of these fires in August, 1884."

Another witness testified: "When I have been on one of those pushers and on No. 4 track going from Albany to West Albany I have seen plenty of sparks from that locomotive; plenty of it with a heavy load. You have got to work the engine heavier, and there are more sparks. I can't tell how far it would throw them; a good ways back; the sparks were all over, from the bottom of the grade to the top of the grade; they would fly all the while; worse when it slipped." Another witness testified: "These pushers, as they pushed

up the heavy freight trains on No. 4 through Railroad avenue, always threw sparks more or less; of course, the larger the train, the more exertion and the more sparks were thrown, and the wetter the track, made it so much worse; but the pushers are not the only ones that throw the sparks; the engine ahead throws as many sparks as the other one; these engines used on No. 4, both the forward engines and the pushers, and the others had large, bulging smoke stacks; all of them, as far as I remember."

Another witness testified: "Of course, engines, when they are working hard and pushing and pulling heavy, throw more sparks than they do when they are working light; there is a harder exhaust on the fire, and consequently they throw more sparks; have seen the sparks come out of the stack pretty thick sometimes; sometimes they go straight up, according to the way the wind blows; I couldn't describe any exact quantity; they go the direction the wind blows; come thick enough so you can see them readily. * * * I never saw any spark arresters that would absolutely and entirely prevent sparks from flying. So far as my judgment and experience are concerned, it is not possible to entirely prevent the emission of sparks from locomotive engines." Another witness, a tenant in the house, testified: "We didn't dare to leave our windows up in front, because the sparks would fly into the front room. I never carpeted the front room on that account. Sometimes left the windows open and sparks would come in." Another tenant testified: "I lived there about a year; occupied the down stairs part; paid three dollars a month; it was a small place; the fires broke out a couple of times while I was there; I couldn't leave my windows open for the sparks coming in; caught fire on the roof; sparks used to come in through the window and door, and I always had to keep them shut." Another witness testified: "I mean to say every time I saw trains stalled there I saw sparks as big as a walnut coming from the engine, when they commenced working, about every time." Another witness testified: "When they were working in that way they threw out a

great deal of cinders, sparks and smoke; have observed the size of the sparks they threw out; they were probably half an inch in diameter; live sparks would fly all over on the building. * * * I lived in that vicinity about thirty years; had noticed these things other witnesses had spoken of in regard to trains ever since he had been there, more or less; sometimes there would be heavy trains, and several engines would be used in pushing them up the grade; on such occasions frequently sparks would be emitted from the engines, and would fly all over."

This evidence came from the plaintiff and his witnesses, and it shows that the emission of sparks at that up grade was continuous and inevitable. There is no evidence and no inference that fewer sparks were emitted when there were but two tracks; but as the nearest track was then further from the plaintiff's house, the danger was less. But from 1874 down to 1884 there was no change, and the evidence fails to show that any engine was defective or out of repair, but they were all alike when pulling heavy trains up the grade past the plaintiff's house. It was impossible to give any evidence as to any particular engine, for the reason that all the time from 1874 to the destruction of his house, it does not appear that the plaintiff made any complaint to the defendant, or made any claim whatever that any of its engines were out of order or defective in any way. The inference from this evidence is that the great emission of sparks was inevitable in drawing trains up such a steep grade, and if it was not inevitable it would have been easy for the plaintiff to have furnished some proof showing that it was due to the defective condition of the engines and to no other cause. Under such circumstances the fact of the emission of large quantities of sparks furnishes no evidence whatever to charge the defendant with negligence. If there had been evidence that any particular engine emitted an unusual quantity of sparks of an unusual size that might, within the authorities cited, have furnished *prima facie* proof that the engine was out of repair, and the burden would have been

cast upon the defendant to show that it was in proper condition and that the emission of sparks was inevitable notwithstanding the use of any ordinary care. Suppose it had been shown that all the engines upon the defendant's road were built and equipped in the usual manner, with approved smoke stacks and spark arresters, and yet that they all emitted large volumes of sparks and smoke, would the mere fact of the emission of sparks in such quantities be any evidence to charge the defendant with negligence? And yet that is the only case the plaintiff has against the defendant prior to 1880. The engines passed so near the plaintiff's house that they set fire to it many times during the period from 1874 to 1884; and even prior to that when there were but two tracks, other property was fired in that vicinity by sparks emitted from passing engines. This house was a small wooden structure, and it is quite apparent that its destruction by fire communicated by engines was inevitable at some time.

Therefore, prior to 1880, while the defendant was using the diamond smoke stack, which was in general and universal use, there is no evidence whatever to charge the defendant with negligence.

But the plaintiff claims that about 1880 a new spark arrester used in what are called extension front engines began to come into use; that such engines emitted fewer sparks and that the defendant was thereafter negligent in not adopting the improvement upon its freight engines, and thus in some measure protecting adjacent property from the danger due to escaping sparks. The meshes of the wire netting constituting the spark arrester were the same in both systems, and the only difference in their operation was that fewer sparks were emitted under the new system than under the old. This new system in 1880 was untried and an experiment, and was gradually introduced upon passenger engines, and a short time prior to 1880 the defendant began to introduce it into its freight engines, and it kept on altering its engines until finally before the trial of this action the new system was in general but not universal use upon its engines. There is no proof showing

how expensive or difficult it was to change an engine from one system to the other, or how rapidly the defendant ought to or could have made the change, or that it was negligent or derelict in any way for not introducing the new system faster than it did. We may assume from our personal observation and from official reports that the defendant after 1880 had in the neighborhood of at least one thousand engines, and what basis is there in this evidence for charging the defendant with negligence for not equipping all these engines with the new system during the brief period of four years? A railroad is not bound at once to introduce every new appliance which is claimed to make its engines safer or more useful. It must have time for trial and experiment. It cannot arrest all of its engines at once to make changes, but must have the time requisite, taking into consideration expense, convenience, the operation of its road, and all the problems connected with such a change. Before the plaintiff could charge the defendant with negligence in not introducing the new system for arresting sparks prior to 1884 he should have furnished some evidence that it was reasonably practicable and possible to do it. Therefore, there was no evidence upon which a charge of negligence could be based because the defendant had not introduced this new system prior to 1884.

There is some evidence, not yet noticed, which is said to be sufficient to charge the defendant with negligence. One witness testified that he knew of three occasions when a hole was knocked in the spark arrester of one of the diamond smoke stacks for the purpose of giving the engine more draft. But whenever that was done it was a mere temporary expedient, to be discovered by the inspectors of smoke stacks and reported at the first opportunity. And there is no proof whatever that any damage to the plaintiff's building came from a spark arrester which had thus been broken. There is also proof that on a few occasions plaintiff's witnesses had discovered large sparks, apparently larger than would go through the meshes of a spark arrester in proper condition. In reference to that evidence it is also to be said that there is no proof

whatever that any damage came to the plaintiff's house from any of those sparks. No effort was made to identify the engine from which they came, and after the lapse of many years it was utterly impossible for the defendant to give any proof about such engine. The defendant is not bound absolutely to keep the spark arresters upon its engines in perfect condition. It is in proof that they would sometimes break and get out of repair, and if the defendant, having a regular system of inspection, repaired them at the first opportunity, it cannot be said to have been negligent.

We are, therefore, of opinion that upon all the evidence the defendant was not in any way legally responsible for the damage done to the plaintiff's property. It is true that his house was burned down and destroyed, and that he thus suffered a loss, but before he can cast the burden of that loss upon the defendant he must show that it violated some legal duty it owed him, and this he failed to do. Upon such evidence as we have here the courts cannot grant him relief if they would. They must follow the law and cannot grant relief against the law.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur, except ANDREWS, Ch. J., and O'BRIEN, J., dissenting, and FINCH, J., not sitting.

Judgment reversed.

FELIX CAMPBELL, Appellant, v. OLIVIA E. P. STOKES et al.,
Respondents.

The will of M. directed his executors to divide his residuary estate into as many shares as he had children, and gave, for each child surviving him, one share to the executors to be held in trust for said child for life. Upon the death of the beneficiary the executors were directed to "convey, transfer, pay over and deliver" the share to his or her lawful issue if any survived the parent. In case none survived provision was made for the disposition of such share. All of the testator's children and sixteen grandchildren were living at his death. In an action for partition of lands of an interest in which M. died seized, the grandchildren were not made parties. In an action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit, *held*, that the issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in after-born children, and to be divested by their death before the death of the parent; that the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power.

Accordingly *held*, that the grandchildren of the testator were necessary parties to the partition suit, and so that plaintiff's title was defective and he was not entitled to enforce his contract.

Reported below, 66 Hun, 381.

(Argued March 14, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term overruling a demurrer to defendants' counterclaim, sustaining said counterclaim and directing judgment in favor of defendants.

This action was brought to compel specific performance of a contract, under which defendants agreed to purchase from plaintiff certain real estate in the city of New York.

Defendants set up a defect of title, and, as a counterclaim, asked to recover the amount paid by them on the execution

142	28
145	538

142	28
147	74

142	28
154	827

142	28
156	404

142	28
163	195
163	200

142	28
166	516

142	28
172	1 72

of the contract, and for expenses and counsel fees in the examination of the title. The counterclaim was demurred to by plaintiff and the demurrer overruled.

Plaintiffs claimed title under a deed given to carry into effect a sale under a judgment in an action brought to partition said premises. John Mortimer, Jr., died seized and possessed of an interest therein; he left six children and sixteen grandchildren him surviving. The children were made parties to the partition suit, but the grandchildren were not. The residuary clause of the will of said Mortimer is as follows:

"IV. All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be in possession, reversion and remainder, I order and direct my executors and trustees to divide into so many shares as I shall have children living at my death, and children who shall have died leaving lawful issue living at my decease, such issue to represent such deceased child, and upon such division to allot to each then living child of mine one such equal share, and to the issue then living of any of my children who may have died leaving such lawful issue one such equal share, and I order and direct my executors and trustees to dispose of such shares from time to time, as follows:

"1st. I give, devise and bequeath one of said equal shares to the lawful issue (living at my death) of each deceased child of mine, to take the same *per stirpes* and not *per capita*, to have and to hold the same to them, their respective heirs, executors, administrators and assigns forever, and I direct my executors and trustees to convey, transfer, pay over and deliver the said share accordingly.

"2d. I give, devise and bequeath one of said equal shares for each of my children living at my decease unto my executors and trustees as a separate fund, to have and to hold the same in trust, to receive the rents, issues and profits thereof, and to apply the same to the use and support of such child, for and during her and his natural life.

"3d. Upon the death of my daughter or son for whom the same is held in trust, I order and direct my said executors and

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trustees to convey, transfer and pay over and deliver the said share to her and his lawful issue *per stirpes* and not *per capita*, to have and to hold the same to such issue, their respective heirs, executors, administrators and assigns forever.

"4th. Upon the death of any of my said children without lawful issue him or her surviving, I order and direct my said executors and trustees to convey, transfer and pay over and deliver the share so held in trust for such child, to and among some or one of my descendants or the widow of any son of mine according to the directions that may be contained in the said last will and testament of such daughter or son, or in an appointment in the nature of a last will and testament made by her or him, to the person or persons in the share or proportions and according to the terms, provisions and conditions therein directed and contained.

"And I hereby authorize and empower such child of mine so dying to make such last will and testament or appointment in the nature thereof, appointing or directing the disposition aforesaid to or among any of my descendants or the widow of any son of mine, but not otherwise, whether such daughter be a *feme sole* or *feme covert* at the time of the making thereof.

"5th. Upon the death of the daughter or son for whom the said respective share is held in trust without leaving lawful issue at her or his death, and without leaving any last will and testament or appointment in the nature thereof, appointing or directing a disposition of the same to or among the persons above designated, then I order and direct my said executors and trustees to convey, transfer, pay over and deliver the said share to my lawful issue *per stirpes* and not *per capita*, to have and to hold the same to such issue, their respective heirs, executors, administrators and assigns forever.

"6th. I authorize and empower my said executors, and the survivors and survivor of them, from time to time, in their or his discretion, and notwithstanding any direction herein to the contrary, to pay, assign and transfer to either of my sons such part of the securities invested for his benefit as they or he in their or his judgment and discretion shall deem best, that they

hold the residue of such securities, if any, for the benefit of my said son in the trust and for the purposes declared of and concerning the whole of his share, and I further authorize my executors and trustees from time to time to pay over to either of my said daughters such part of the said securities invested for their benefit as they may deem best, not exceeding the sum of five thousand dollars, and I direct, authorize and empower my executors on the decease of any son of mine to apply to the use of his widow, if any, my said sons shall leave, during her widowhood, one-third part of the interest and income arising from the part or share of my estate ordered to be set apart for the benefit of my said son, or so much of the same as may remain at the death of my son if any advance shall have been made to him pursuant to this clause of my will, providing the son dying and leaving a widow shall have failed to leave a valid will or to make any valid appointment in the nature thereof, and the residue of such share shall be disposed of by my said executors as hereinbefore directed."

Further material facts are stated in the opinion.

James Troy for appellant. The will of the testator created but one valid trust under the statute, namely, the trust to collect the rents, issues and profits of his estate and apply the same to the use of his children. (1 R. S. 728, § 55, sub. 3.) All other trusts contained in the will were void as express trusts and were valid only as powers in trust. (*Townshend v. Frommer*, 125 N. Y. 458.) The grandchildren of the testator took no vested interest in his estate. (*Konvalinka v. Schlegel*, 104 N. Y. 130; *Smith v. Edwards*, 88 id. 104; *Warner v. Durant*, 76 id. 133; *Gaebel v. Wolf*, 113 id. 412; *U. S. T. Co. v. Roche*, 116 id. 120.) The provisions of the will worked an equitable conversion of the real estate, and the grandchildren of the testator were not necessary or proper parties to the action of partition. (*Delafeld v. Barlow*, 107 N. Y. 535.)

William Allen Butler for respondent. A reasonable doubt existed as to the validity of the title to the premises in

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question tendered by the plaintiff under his contract of sale. (*Fleming v. Burnham*, 100 N. Y. 1, 10; *Shriver v. Shriver*, 86 id. 575; *Vought v. Williams*, 120 id. 253; *B. P. Comrs. v. Armstrong*, 45 id. 234; *M. E. Church v. Thompson*, 108 id. 618; *Argall v. Raynor*, 20 Hun, 267; *Kilpatrick v. Barron*, 125 N. Y. 751.) Unless all the necessary persons were made parties to the action of the partition the proceedings were defective, and the title acquired by the plaintiff under the partition sale was not a good title in fee. (*Jordan v. Poillon*, 77 N. Y. 518; *Argall v. Raynor*, 20 Hun, 267; *Mead v. Mitchell*, 17 N. Y. 210, 214; *Moore v. Appleby*, 108 id. 237.) The issue of the children of John Mortimer, Jr., alive at the time of the commencement of the partition suit, took vested estates of inheritance under the will of their ancestor, subject to the life estate for the benefit of their parents respectively, and they were, therefore, necessary parties defendant to the partition suit. (*Moore v. Appleby*, 108 N. Y. 237.) This court having repeatedly held, in cases of trusts for life tenants with directions to convey on the termination of the life estate to designated remaindermen or to a class, that such remaindermen are necessary parties, if in being, to a foreclosure or partition intended to pass the title by a sale, the question is open whether the issue of the children of John Mortimer, Jr., were barred by the partition. (*Gilman v. Reddington*, 24 N. Y. 1, 16; *Stephenson v. Leslie*, 70 id. 512, 516; *Moore v. Appleby*, 108 id. 237; *Miller v. Wright*, 109 id. 194; *Genet v. Hunt*, 113 id. 158; *Brunner v. Meigs*, 64 id. 506.) No question of equitable conversion can be raised by the plaintiff. (*Scholle v. Scholle*, 113 N. Y. 261; *Hobson v. Hale*, 95 id. 588; *Chamberlain v. Taylor*, 105 id. 185.)

ANDREWS, Ch. J. John Mortimer, Jr., had six children living at his death, in September, 1875, and sixteen grandchildren, some or all of whom are still living. The scheme of his will, made in March, 1875, was to divide his residuary real and personal estate into shares, and to give to each of his surviving children the income of one share for life, and the

principal of such share on the death of any child to his issue then surviving. He contemplated the possible death of a child before his death, leaving issue surviving, and in that case such issue surviving at testator's death was to take absolutely the share of the deceased child. In case a surviving child should die after the death of the testator, leaving no issue living at his or her death, then the share of the one so dying was to be subject to certain dispositions not now necessary to be stated. All the testator's children survived him, and the provision made for the issue of a deceased child who may have died before the testator, leaving issue surviving at the testator's death, became inoperative. To effect the scheme of the testator the will directed his executors and trustees to divide his residuary estate into so many shares as he should have children living at his death, and children who should have died leaving lawful issue surviving at the testator's death, and to allot one share to each child surviving him, and a share to the issue of any deceased child. By the fourth section of the will, which prescribes the disposition to be made of his residuary estate, the testator devised and bequeathed to the issue of any child who had died before him, leaving issue surviving at the testator's death, one share absolutely, as before stated. He devised and bequeathed to his executors and trustees one of said equal shares for each of his children living at his death, in trust to receive the rents, issues and profits thereof, and apply the same to the use and support of such child during his natural life. The third subdivision of section four of the will provides for the disposition of the principal of the share of any such child on his or her death, as follows: "Upon the death of my daughter or son for whom the same is held in trust, I order and direct my said executors and trustees to convey, transfer and pay over and deliver the said share to his or her lawful issue *per stirpes*, and not *per capita*, to have and to hold the same to such issue, their respective heirs, executors, administrators and assigns forever." Then follow provisions for the disposition of the share of any child on his or her death "without lawful issue him or her surviving."

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It is plain that, upon settled rules of construction, the issue of any child of the testator living at his death, took under the will a vested remainder in the share held in trust for the parent for life, subject to open and let in after-born children, and to be divested by their death before the death of the parent. The limitation in its general aspects is very familiar, and one frequently found in wills. Upon the death of the testator, individuals of the class entitled to take in remainder were in existence and ascertainable. The only contingency which would defeat their remainders vesting in possession was their death before the death of the parent. It was a subsequent and not a precedent condition. The direction that the trustees on the death of the parent should "convey, transfer and pay over and deliver" the parent's share to his or her issue, was inserted to emphasize the right of the remaindermen, and was not the foundation of their title. The whole scope of the will negatives the idea that their rights were dependent in any way on the action of the trustees, or that the vesting of their interest awaited the exercise by the trustees of the power to transfer, convey and deliver the share to the issue so entitled. The testator did not intend to die intestate as to any portion of his property. The whole was given to his children and their issue. The trust was created to secure to his sons and daughters the beneficial enjoyment of their several shares for life and to preserve the principal for their issue, and careful provision was made for the disposition of the share of any child in the contingency of his or her death leaving no issue surviving. There is no room for the application of the technical rule sometimes resorted to, to ascertain whether an interest given by a will is vested or contingent, that where the gift is only found in the direction to divide at a future day, this circumstance may be considered and have weight. It is a rule for ascertaining the real intention of a testator and not for defeating it. Those entitled under this will as remaindermen took, not because the power of division was given to the trustees, but independently thereof, as primary

devisees in remainder under the will. The class may be enlarged or diminished, or the rights of the issue of any child may be extinguished by the extinction of such issue by death before the termination of the life estate, but this does not affect the question. The issue living are presumptively entitled in remainder, and during the life of the parent, they living, have a vested future estate in the parent's share. The case of *Moore v. Appleby* (108 N. Y. 237) is a direct authority for the conclusion above stated and follows prior cases as well as the rule of the statute. (*Mead v. Mitchell*, 17 N. Y. 210; *Moore v. Littel*, 41 id. 76; 1 Rev. St. 723, § 13.) The case of *Townshend v. Frommer* (125 N. Y. 446) does not and was not intended to overturn the general doctrine, that remaindermen are not bound by a conveyance of the estate to which their interest attaches unless they are parties thereto in fact or in law. The case was peculiar and anomalous and involved complicated questions under the law of trusts and powers. It arose under a trust deed, whereby the grantor retained the beneficial use of the property for life and which contained directions for the disposition of the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened. The present case affords no ground for such a presumption. Whether the remainders in this case were vested or contingent, the persons in being when the partition action was commenced, presumptively entitled to possession on the death of the life tenant, were necessary parties.

This leads to an affirmance of the judgment.

All concur.

Judgment affirmed.

FRANK HARLEY, Respondent, v. BUFFALO CAR MANUFACTURING COMPANY, Appellant.

142	81
151	422
142	81
163	5
142	81
164	496

A master is not bound to furnish the best known appliances for the work in which his servant is employed, but only such as are reasonably fit and safe; he satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if selecting them for his individual use.

Where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master may not be made liable where, in selecting the appliance which causes an injury to his servant, he took the one which, according to his judgment and that of skilled men in his employ, was the best.

It is culpable negligence, not an error of judgment, which imposes the liability.

Plaintiff, an employee in defendant's machine shop, was injured by the breaking of a belt used to move machinery. The belt was fastened at a splice with a belt fastener which gave way. In an action to recover damages it appeared that there were several kinds of fasteners in use, all of them liable to break under some unusual strain, and no one could foresee when they would break. The witnesses differed as to which of the fasteners was the safest. A number of the witnesses, who apparently had had the greatest experience with the one used, gave it the preference. It had been manufactured, sold and used in large numbers in this country and elsewhere for several years before the accident. It did not appear that they were less safe than any other fasteners or that any serious accident had ever happened before from the breaking of any fastener. *Held*, that the evidence failed to show any negligence on the part of defendant; and so, that it was not liable.

Plaintiff was permitted, under objection and exception, to ask several of his witnesses their opinion as to the safety of the fastener used. *Held*, error.

It appeared that defendant kept on hand in its shop a large number of these fasteners, and when a belt parted it was the duty of the employees to splice it and to use a sufficient number of fasteners for that purpose. *Held*, that if in splicing this belt a sufficient number of fasteners were not used to make it safe the negligence was that of the employees, not the master's.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon

an order made October 4, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adelbert Moot for appellant. An employer is not required to furnish the best machinery and appliances, and he is not chargeable with negligence if he furnishes machinery and appliances such as are to be found in common use, although they are not the best upon the market. (*Shaffer v. Haish*, 110 Penn. St. 575; *Develin v. Smith*, 89 N. Y. 470; *Bunke v. Witherbee*, 98 id. 563; *Sweeney v. Berlin & Co.*, 101 id. 520; *Bajus v. R. Co.*, 103 id. 312; *Hickey v. Taaffe*, 105 id. 26; *Stringham v. Hilton*, 111 id. 188; *Dobbins v. Brown*, 119 id. 189; *Hart v. Naumberg*, 123 id. 641; *Kearn v. D. & D. S. R. Co.*, 125 id. 50.) The belt in this case being an appliance as to which defects arise in daily use, which are not of a permanent character, and do not require the help of skilled mechanics to repair, but which may be easily and are easily remedied by the workmen, and to repair which proper and suitable materials are supplied, it follows that the failure of the workmen to keep this belt in repair, or to use a sufficient number of fasteners to keep it in repair or make it sufficiently strong, is not the negligence of the defendant, but is the negligence of co-servants, for which the defendant is not liable. (*Cregan v. Marston*, 126 N. Y. 568; *McGee v. B. C. Co.*, 139 Mass. 445.) The court erred in permitting witnesses to give their opinion as to whether the fastener was a sufficient fastener or not, as this was the very question to be tried by the jury, and one which they could have decided properly from an inspection of the fasteners put in evidence, and from hearing the testimony; and the comparison by experts of these fasteners with other fasteners was improper. (*Schwander v. Birge*, 46 Hun, 66; *Schneider v. S. A. R. Co.*, 133 N. Y. 583; *People v. Manke*, 78 id. 611.) The risk of the belt breaking, in daily use, and endangering a person who might be near, was an obvious risk, one plaintiff had

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assumed, not a hidden or extraordinary danger, which defendant was required to point out, and which would be a risk plaintiff would not assume; and, if defendant's employees, being furnished with plenty of fasteners, did not keep this belt in repair with them, or did not use sufficient fasteners in joining it together, then such error of judgment, or negligence, on the part of his co-employees was also a risk which plaintiff had assumed, consequently defendant is not liable to the plaintiff for the injury he sustained by the breaking of the belt. (*White v. W. F. Ins. Co.*, 131 N. Y. 631; *Kaare v. T. S. & I. Co.*, 139 id. 369; *Ogley v. Miles*, Id. 458; *Haskin v. R. R. Co.*, 65 Barb. 129; *King v. R. R. Co.*, 9 Cush. 112; *Cahill v. Hilton*, 106 N. Y. 517; *Taylor v. C. M. Co.*, 140 Mass. 154; *Huddleston v. L. M. Shop*, 106 id. 282; *Goodnow v. N. E. Mills*, 146 id. 261; *Coombs v. N. B. C. Co.*, 102 id. 572; *Sullivan v. I. M. Co.*, 113 id. 396; *Russell v. Tillotson*, 140 id. 201; *Taylor v. C. M. Co.*, Id. 150.) If there was negligence it was the negligence of plaintiff's co-employees, and the defendant is not liable therefor, under the circumstances of this case. (*Oregan v. Marston*, 126 N. Y. 568; *Cullen v. Norton*, Id. 1; *Hussey v. Cogger*, 112 id. 614.)

George Wing for respondent. The duty of furnishing suitable machinery and appliances and keeping them in repair cannot be delegated to a servant, and the master thereby be relieved from responsibility. (*Benzing v. Steinway*, 101 N. Y. 552; *Stringham v. Stewart*, 100 id. 516; *Cone v. D., L. & W. R. R. Co.*, 81 id. 208; *Painton v. N. C. R. R. Co.*, 83 id. 7; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 547; *Pantzar v. T. F. I. M. Co.*, 99 id. 369; *Kranz v. L. I. R. R. Co.*, 123 id. 4; *McGovern v. C. V. R. R. Co.*, Id. 281.) It was competent to allow the jury to examine the staple offered in evidence after the plaintiff had established that it was the same kind and size of staple used by defendant and which parted and injured the plaintiff. (*Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589; *People v. Buddensieck*,

103 id. 501.) Whether the belt staple in question was a proper or safe appliance to be used on such a belt was a proper subject for expert testimony. (*Price v. Powell*, 3 N. Y. 322; *Curtis v. Gano*, 26 id. 426; *Bellinger v. N. Y. C. R. R. Co.*, 23 id. 42; *Moore v. Westervelt*, 27 id. 234; *Baird v. Daly*, 68 id. 547; *Scattergood v. Wood*, 79 id. 263; *Emerson v. F. G. L. Co.*, 6 Allen, 146.) No matter whose hand does the work of the master in furnishing a safe, efficient and secure belt, if it is not properly done the master is liable for any accident resulting therefrom. (*Benzing v. Steinway*, 101 N. Y. 552.) The servant, upon entering the employment of the master, does not assume the risk of the master's negligence. (*Booth v. B. & A. R. R. Co.*, 74 N. Y. 40; *McGovern v. C. V. R. R. Co.*, 123 id. 281.)

EARL, J. This action was brought by the plaintiff to recover damages against the defendant for a serious injury received by him from the breaking of a belt used to move machinery in the defendant's shop at the city of Buffalo.

The principles of law applicable to such a case as this have exposition in many decisions of this court. It is sufficient to cite the following: (*Devlin v. Smith*, 89 N. Y. 470; *Burke v. Witherbee*, 98 id. 562; *Sweeney v. Envelope Co.*, 101 id. 520; *Bajus v. S. B. & N. Y. R. R. Co.*, 103 id. 312; *Hickey v. Taafee*, 105 id. 26; *Stringham v. Hilton*, 111 id. 188; *Buckley v. G. P. & R. M. Co.*, 113 id. 540; *Dobbins v. Brown*, 119 id. 188; *Cosulich v. S. O. Co.*, 122 id. 118; *Hart v. Naumburg*, 123 id. 641; *Kern v. De Castro & D. S. R. Co.*, 125 id. 50; *Carlson v. P. B. Co.*, 132 id. 273.)

The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having

regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment.

Here the belt was fastened at one of its splices with what was called the Buffalo belt fastener, and while the machinery was running the fastener gave way and the belt parted and caused the injury to the plaintiff. It was shown upon the trial that there were several kinds of belt fasteners in use; that all of them were liable to break; that no one could foresee when they would break, and that they generally broke under some unusual strain which might come from a variety of causes. The witnesses differ as to which of the fasteners in use was the safest and best, some of them giving preference to one kind and some to another. The evidence shows that one kind would be better on some belts and another kind better on other belts, the fact of safety and utility depending upon the machinery upon which the fastener is used, the place where it is used, the work which is to be done, and the strain to which it is to be subjected. A number of witnesses who apparently had had the greatest experience with the Buffalo fastener gave it the preference for safety and efficiency. It was a patented article and had been manufactured, sold and used for several years before this accident. It was manufactured in Buffalo, and one of the persons engaged in its manufacture testified that these fasteners were extensively sold all over this country and in Canada, and that some of them were exported; that the sales of them had constantly increased until they reached in value \$40,000 a year, and thus it is probable that several hundred thousands of them were sold and put to use every year. The skilled workmen in the employment of the defendant who had used them for several years testified that they were convenient, useful, efficient and safe. It does not appear that they had been less safe than any other fastener in use, nor does it appear that any serious accident had ever before happened from the breaking of any belt fastener.

Under such circumstances how can it be said that the defendant violated any duty it owed to the plaintiff? It was

impossible from the evidence to determine whether these fasteners were or were not the best in use for such a belt and such machinery as the defendant had at the time and place of the accident. Suppose a master needing fasteners in his shop makes inquiry among men of skill and experience as to the best kind of fasteners to use, and he is informed by some that one kind is the best, and by others that another kind is the best, and so on, and he finally makes a selection, using his best judgment; and suppose it should turn out that it was not the best, could he, under such circumstances, be held liable for an injury received by a person in his service from the parting of a belt on account of the insufficiency of the fastener under any particular strain to which the belt had been subjected? But we may go one step further. Suppose, under such circumstances, he purchased fasteners for use in his shop, which, according to the judgment of his skilled workmen were found to be useful, convenient and safe, and the very best in use, can he then be charged with negligence for continuing to use them and be made liable to one who is accidentally injured by the parting of a belt? Suppose, under the circumstances which exist here, the defendant had adopted one of the other fasteners for this particular belt and an accident had happened from its parting, there would have been substantially the same evidence for the jury and the same claim could have been made which is now made, that there was a question of fact for the jury as to its negligence in making the selection. This judgment cannot be affirmed without subjecting the master in such a case as this to the risk of liability for injuries from the parting of a belt moving machinery in his shop, whatever fastener he may use, because if he uses one kind, according to the evidence in this case, it is easy to find persons who will testify that from their experience and observation some other kind was better.

It must always be true that where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants, if in selecting the particular

appliance he takes what according to his judgment is the best or most suitable, guided by his experience and observation and those of the skilled men in his employment.

Upon the evidence in this case, it cannot even be determined that the managers of the defendant erred in their judgment in the selection of this kind of fastener. But if there was an error in judgment, it was not such as to constitute that degree of negligence and want of prudence which, under the rules of law above cited, can impose liability for such an accident as this.

If it should be claimed that, in splicing the belt, a sufficient number of these fasteners was not used to make it safe and secure, it may be answered that the proof does not show that there was not a sufficient number; and even if there was not, that circumstance would not impose liability upon the defendant in this action, because it furnished and kept on hand in its shop a large quantity of the fasteners for use by its employees, and when a belt parted, as they were liable to frequently, they were bound, in the exercise of their skill and judgment, to splice it and to use a sufficient number of fasteners for that purpose; and if they did not, then the negligence was that of a co-employee, and on that account the defendant could not be held liable.

If there was any weakness in the particular fasteners used in this belt, from imperfect manufacture or imperfect material, such imperfection not being visible to ordinary observation, the defendant could not be made liable on that account, as they were the same kind of fasteners which they had used for years with entire success and safety and which they had purchased from the manufacturers engaged extensively in their production and sale.

Upon the trial of the action the main issue to be determined by the jury was whether the Buffalo belt fastener was suitable and safe for fastening the belt in question, and the plaintiff was permitted, against the objection of the defendant's counsel, to ask several of his witnesses their opinion as to their safety and fitness. We think these questions were objectionable. A

sample of this belt fastener was produced before the jury, and also a piece of belt showing how the fastener was used. Its size and mode of use were apparent to the jury. It was competent for the plaintiff to prove the strain to which it would be subjected, its liability to break and all the experiences of persons who had used it; and thus all the facts could be placed before the jury from which they could determine whether or not it was a suitable and safe belt fastener. It cannot be proper to have the issue determined by the opinions of experts, however skilled and experienced they may be. The facts should be placed before the jury and they should be left to determine whether the belt fastener was safe or otherwise. (*Van Wycklen v. City of Brooklyn*, 118 N. Y. 424; *Roberts v. N. Y. E. R. R. Co.*, 128 id. 455; *Schneider v. Second Avenue R. R. Co.*, 133 id. 583.)

We are, therefore, of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur (ANDREWS, Ch. J., on exceptions to evidence), except BARTLETT, J., dissenting.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES F. UNDERHILL, Appellant.

To sustain a conviction for forgery under the provision of the Penal Code (§ 521) which declares a person to be guilty of that offense "who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true" an "instrument or writing," the forgery or altering of which is forgery, it must appear that the writing or instrument was forged, or was altered after its execution. The provision has no application to a writing the signature to which is genuine and no change in which is shown to have been made after its execution, although it appears it was executed by the party signing it under a mistake or in ignorance of its contents, induced by fraud or deceit on the part of the defendant.

The same rule applies to the provisions of said Code declaring an officer of a corporation "who falsifies or unlawfully or corruptly alters" any "writing belonging to or appertaining to the business of the corporation" (§ 514), or any person who, with intent to defraud or to conceal

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any larceny or misappropriation, alters any writing belonging to the business of a corporation, to be guilty of forgery.

Upon the trial of an indictment for forgery it appeared that defendant, who was president of a life insurance association, with another person employed by it to adjust losses, settled a claim against it for \$400. The claimant was induced by fraud to sign a written instrument releasing his claim, in which the sum paid was stated to be \$1,400, he supposing the sum stated therein to be that paid. Defendant drew \$1,400 from the treasury of the association and either he or his associate retained and fraudulently appropriated \$1,000 thereof. The release was sent to the office of the company and treated as a record of settlement of the claim for \$1,400 and a voucher for the disbursement of that sum. Defendant was convicted of forgery in the third degree. *Held*, error; that the offense committed by him was not forgery.

(Argued March 19, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1894, which affirmed a judgment of the Court of Oyer and Terminer of Monroe county entered upon a verdict convicting defendant of the crime of forgery in the third degree, and also affirmed an order denying a motion for a new trial and in arrest of judgment.

The facts, so far as material, are stated in the opinion.

George Raines for appellant. The court erred in charging the jury under the fourth count of the indictment that it was immaterial whether the release was altered from four to fourteen before or after the signing by Wareham, and also erred in refusing to charge defendant's request that the release was not a writing nor record of the association until signed. (Penal Code, §§ 513, 541; *People v. Dewey*, 35 Hun, 308; *People v. Martin*, 36 id. 462; *People v. Harrison*, 8 Barb. 560, 562; *People v. Galloway*, 17 Wend. 542; *People v. Cunningham*, 4 Hun, 455; *People v. Rhoner*, 4 Park. 106; *Reg. v. Smith*, 3 Cox C. C. 32; *King v. Moffat*, Leach, 483; *People v. Fadner*, 2 N. Y. Cr. Rep. 553; *People v. Shall*, 9 Cow. 778; *People v. Fitch*, 1 Wend. 198; *People v. Stearns*, 21 id. 409; 2 Bish. on Cr. Law, 533; *Roode v. State*, 25 Am. Rep. 475; *State v. Greenlee*, 1 Dev. 523.) The court erred

in charging the jury there could be four several acts of uttering for either of which a verdict could be rendered under the fourth count; first, the uttering in sending the paper from Michigan by himself or by McCargo by his direction to the association at Rochester; second, by taking it from the files of the company at the meeting of directors January 17, 1891, and commending it to the meeting for payment; third, an uttering to Colvin by his conversation about it. (*People v. Read*, 86 N. Y. 381.) The court erred in charging the jury that the other alleged offense in the settlement of the *Mansfield* case at Cleveland was to be considered by the jury on the main question of the fact of the forgery or alteration being committed by defendant, and whether before or after the signing by Wareham. This proof, if of a similar transaction, was incompetent on anything but knowledge, or intent in uttering, not upon the time of the alteration. (*People v. Everhardt*, 104 N. Y. 595; *Mayer v. People*, 80 id. 364; *Shipley v. People*, 86 id. 380; *U. S. v. Russell*, 19 Fed. Rep. 591; 104 N. Y. 591; 5 N. Y. Cr. Rep. 91; 56 N. Y. 363; 4 Park. Cr. Rep. 199.) The variance of the paper if forged before signature from the allegations of the indictment of its condition as a signed instrument, is a fatal variance, and the court made many errors in charging that the jury could convict whether signed or unsigned when altered. (*State v. Street*, 1 Am. Dec. 589; *Sharley v. State*, 54 Ind. 168; *Com. v. Wilson*, 68 Mass. 70.) Depositing a forged instrument in the post-office at Lansing, Michigan, to be forwarded to Rochester, N. Y., is not an uttering at Rochester, and the court erred in so charging. (*U. S. v. Plympton*, 4 Cranch [C. Ct.], 309; *U. S. v. Wright*, 2 id. 295.)

Howard H. Widener for respondent. There was no demurrer filed to this indictment, and any misjoinder of offenses in the same indictment is, therefore, waived, or any other defect in form. (*People v. Tower*, 48 N. Y. S. R. 438; Code Crim. Pro. § 331.) The defendant's absence from the state a part of the time during the course of this transaction

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is immaterial. (Penal Code, §§ 294, 676; *People v. Bliven*, 112 N. Y. 79; *Adams v. People*, 1 id. 173.) It was immaterial, upon the verdict rendered by the jury, whether the "teen" was inserted in the instrument before or after its execution and signing by Wareham, and the judge's charge upon this point was correct. (Penal Code, §§ 514, 515, 520; 3 Greenl. on Ev. § 103; *Comm. v. Ray*, 69 Mass. 446; *Rex v. Hart*, 7 C. & P. 652; *Mayer v. People*, 80 N. Y. 364; *People v. Rathbun*, 21 Wend. 509; Penal Code, § 514.) The evidence in this case shows that the trial jury rendered a correct verdict and such a verdict should not be disturbed. (*Shorter v. People*, 2 N. Y. 193; *People v. Dimick*, 107 id. 34.)

O'BRIEN, J. The defendant was convicted of the crime of forgery in the third degree, upon an indictment containing four counts, charging, in various forms, the forging, altering and uttering by the defendant, when president of the Flour City Life Association, an insurance corporation or association on the co-operative or assessment plan, of a writing belonging to and pertaining to the business of the association, with intent to defraud. There is little if any dispute in regard to the main facts of the transaction upon which the indictment was framed. It appears by the record that the defendant was the president of the insurance association above named, and as such one of the principal managing officers. The main business office of the corporation was at Rochester. In the year 1889 one Philip Wareham, a resident of the state of Michigan, applied for membership in the association, was accepted, and two certificates issued to him upon the terms and for the purpose of securing the benefits and indemnity provided by the charter and by-laws of the association. In November, 1890, he died, and his son, Hamilton Wareham, the beneficiary named in the certificate, presented to the corporation proofs of death, and claimed \$2,000 as the sum secured to him by the insurance. It was claimed that the certificate was procured by the beneficiary from the association by fraud, and

the loss was not recognized by the company as one for which it was liable. In the early part of December, 1890, the defendant and another person, employed to adjust losses, went to Michigan, and settled the claim for \$400. The beneficiary signed and sealed a written instrument, bearing date December 3, by which the claim was compromised and released. The instrument recites the issuing of the certificate, the amount apparently due thereon, the fact that a defense existed to the same on the part of the company, and the release of the claim upon payment of \$1,400. The actual settlement with the beneficiary was for \$400 and he was paid only that sum. The evidence tended to show that the defendant drew \$1,400 from the treasury of the corporation, paid \$400 to the beneficiary in settlement of the claim and that either he or his associate retained the balance of \$1,000 and fraudulently appropriated the same. The proof also tended to show that the beneficiary intended to settle for the \$400 and supposed that such sum was the consideration expressed in the paper which he signed, and that the word "fourteen" instead of "four" was fraudulently inserted in the paper before the same was signed. The settlement was made in a room at a hotel at Lansing, Michigan, and the defendant, the adjuster who accompanied him, the local agent of the company at that place, and the beneficiary who presented the claim, were all present at the transaction. The paper was sent to the office of the company at Rochester and placed on file, and there treated as a record of the settlement and adjustment of the claim at \$1,400 and as a voucher for a disbursement of that amount, but by whom it was mailed or sent does not conclusively appear, though there was proof sufficient to warrant the jury in finding that it was mailed to the office by the defendant. It was for forging and uttering this paper that the defendant was indicted and tried. With respect to the charge of forgery by corruptly altering the instrument, it was assumed that the defendant could not be convicted if it was done in the state of Michigan or beyond the jurisdiction of this state, and the learned trial judge so charged in substance. The

signature of Wareham, the beneficiary, was admitted to be and, beyond all doubt, was genuine, and thus the charge of forgery proper had to rest upon proof that the defendant, after the execution of the paper and within this state, altered the same by changing the word *four* so as to make it read *fourteen*. The proof upon this point was of such a character that the learned trial judge, before the close of his charge, expressed the opinion that if the jury found the defendant guilty at all it must be of uttering the instrument knowing it to be forged or counterfeit. The jury returned a verdict of guilty of forgery in the third degree in uttering the paper. In regard to the facts it was the theory of the defendant's counsel that the word *fourteen* was fraudulently inserted or changed before the paper was actually signed by the beneficiary, and the proof at the trial, and all the circumstances tended to sustain this theory, though it may be there was some proof in support of the claim that the change was made by some one after execution. It is not important to examine the evidence in support of the last hypothesis, since the cause was tried and submitted to the jury upon the principle that, as to the charge of uttering the instrument, it was wholly immaterial whether the defendant made the change before or after it was signed. The learned judge so instructed the jury. At the close of the charge the defendant's counsel requested the court to instruct the jury that if the instrument was altered before it was signed or executed no conviction could be had under the indictment for uttering a forged paper. The learned judge refused to so instruct; and to this refusal, as well as to the charge as made, on this subject, there was an exception. It is apparent from the evidence given and now appearing in the record, from the general course of the trial and from the charge, that this judgment cannot be sustained except upon the theory that the defendant committed the crime of forgery in the third degree in knowingly uttering or passing off as true, an instrument releasing and compromising the claim against the company, which the defendant had procured, or induced the beneficiary to execute, by some fraud, device or

misrepresentation, with intent to defraud the corporation, of which he was the chief executive officer, and which, in fact, was used for that purpose, and had that effect.

By § 521 of the Penal Code a person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, * * * a forged * * * writing or other thing, the false making, forging or offering of which is punishable as forgery, is guilty of forgery in the same degree as if he had forged the same. In order to bring a case within this section the thing or writing must be forged, altered or counterfeited, and if it is, then uttering it or passing it off as true, is punishable in the same manner as the forgery itself. It is not necessary to prove that the accused forged or altered the writing himself. It is sufficient if it appears that he has knowingly uttered or passed it off as true, knowing it to be false, forged or altered. But this section has no application to a writing, the signature to which is genuine, and no change in which is shown to have been made after execution, but executed by the party under a mistake or in ignorance of the facts, induced by fraud or deceit. By § 514 an officer of a corporation who falsifies, or unlawfully or corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, is guilty of forgery in the third degree, and the same offense is committed under § 515 by any person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, alters any writing belonging to or appertaining to the business of a corporation. The instrument in question was, when executed, a writing belonging to or appertaining to the business of a corporation, within the meaning of these sections, and if proved to have been changed in the manner stated in the indictment, after its execution by the defendant, he could have been convicted of forgery, if done within the jurisdiction of this state, or of altering or passing it off as true, if, knowing its character, he caused it to be deposited in the office of the company for the

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purpose of giving it effect or with intent to defraud the company.

But assuming as we must that the word *fourteen* was fraudulently inserted, or that the word *four* was fraudulently changed before the execution, then the offense which the party committed was not forgery. No writing was altered within the meaning of the statute, but a fraud was perpetrated upon the company, and perhaps upon the party who signed the paper. If the defendant by means of such a paper knowingly appropriated to his own use the corporate funds, he doubtless subjected himself to civil and criminal responsibility. We are not now concerned with the particular offense against the Penal Code involved in such an act, as that question is not now before us, but it would seem to be clear that it does not and never did constitute the crime of forgery in any degree, and the altering of such a paper before execution did not warrant a conviction under the indictment. In order to sustain any of the counts in the indictment it was incumbent upon the People to show that the defendant corruptly and with intent to defraud, either forged or altered the paper after it had been signed, or that he uttered or passed it off as true, knowing that it had been so changed or altered. The word *writing* as used in these sections refers to an executed instrument, and it is so defined in § 513. That section declares that "An instrument partly written and partly printed, or wholly printed, with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association, or an officer thereof, is a written instrument or a writing within the provisions of this chapter." The learned court below was of the opinion that the crime of forgery is complete when it is shown that a party falsifies a writing, and that in this case it was shown to be a false paper, as it was used to represent to the corporation that Wareham had been paid \$1,400, when, in fact, he had been paid but \$400. The paper was doubtless intended as a fraudulent device to obtain money from the corporation for the benefit of the defend-

ant or whoever received it, but the use for which it was intended and to which it was in fact put did not make it a forgery. In order to establish the commission of that crime it was necessary to prove, to the satisfaction of the jury, that the defendant, with intent to defraud, altered the paper after it was signed, for not till then was it a writing within the meaning of the statute, and it is the altering or passing off as true of a writing thus altered, with knowledge that it has been so changed, that the statute punishes in the same way as the forgery or alteration itself. This was a false paper in the sense that it expressed a falsehood and was calculated to deceive and defraud ; but every false paper is not necessarily a forgery. An instrument of this character is falsified within the meaning of the statute referred to only when, by some alteration after actual execution, it is made to speak differently from what it did when signed, or given a different effect in some material respect, with a fraudulent or corrupt intent. We think that the case was submitted to the jury upon an erroneous view of the law applicable to the questions involved.

There are other questions in the case raised by exceptions taken in the course of the trial and to the charge and to refusals to charge. Some of these questions are of considerable importance and it might be difficult to sustain the rulings upon them made at the trial, but as the point already discussed disposes of the appeal it is not necessary for us to consider them, since they may not arise upon another trial.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

SAMUEL H. RANDALL, Respondent, v. GEORGE W. PACKARD,
Appellant.

SAME, Respondent, v. SAME, Appellant.

The result of a lawyer's services is a proper and an important element to be taken into consideration in determining their value.

A judgment should not be reversed upon an exception to a remark of the trial judge, which, although erroneous standing by itself, was so coupled with other statements as to modify it and give the correct rule.

In an action by an attorney to recover compensation for professional services, the court charged in substance that in estimating the value of plaintiff's services, "several circumstances must enter into the computation, *i. e.*, the professional reputation of plaintiff for ability and integrity, the difficulty and importance of the case, the amount of work and labor performed, the amount involved, the pecuniary ability of the client," and after a general discussion of these considerations stated, "the main element after all in determining the value of the lawyer's services is the result," adding, "a charge must be adjusted to the benefit, in a measure at all events. * * * Undoubtedly a lawyer * * * will not charge as much if his client be unsuccessful. * * * You must look to the benefit." *Held*, that the charge, taken as a whole, simply conveyed the idea that while the result was an important element to be considered, it was only one of the several elements specified, and so there was no error.

A motion for a new trial was made after judgment for plaintiff, on the ground that he had sworn falsely upon his cross-examination on the trial, in denying he had been disbarred as an attorney. *Held*, that as from the proofs presented on the motion it was a debatable question, admitting of opposing inferences as to whether plaintiff had been actually disbarred, in the legal sense of that word, it could not be said, as matter of law, that he had sworn falsely, and that the decision of the court below denying the motion was not reviewable here.

(Argued February 26, 1894; decided April 10, 1894.)

APPEAL from judgment of General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 7, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Appeal also from order of same court, made November 7, 1892, which affirmed an order of Special Term denying a motion for a new trial made after judgment.

The nature of the action and the facts, so far as material, are stated in the opinion.

Wheeler H. Peckham for appellant. The court erred in its charge that the main element after all in determining the value of a lawyer's services is the result of his labor. (*Matthews v. Bliss*, 22 Pick. 53.)

Points on appeal from order :

The court has jurisdiction of this appeal. (*People v. Fire Comrs.*, 106 N. Y. 257.) It was error in the courts below to deny defendant's motion for a new trial. (*People v. McGuire*, 2 Hun, 270, 271; *Holty v. Schmidt*, 12 J. & S. 327; *Weber v. Weber*, 5 N. Y. Supp. 178; *Patrie v. Milles*, 3 Douglas, 27; *Harrison v. Harrison*, 9 Price, 89; *Morrell v. Kinball*, 1 Greenl. 322; *Wehrkamp v. Willet*, 1 Daly, 4.) If we look at the opinion of the court below it becomes clear that the court has erred, and not merely exercised a discretion. (*Mead v. Burns*, 32 Hun, 275; 7 Wall. 523; *Hinckley v. Miles*, 15 Hun, 170.)

Samuel H. Randall, respondent, in person. It was a matter for the discretion of the General Term whether or not to set aside the verdict as excessive. The exercise of this discretion is not reviewable here. (*Peck v. R. R. Co.*, 70 N. Y. 587; *McKeever v. Mayor*, 11 Wkly. Dig. 258.) The court's charge, "the main element after all in determining the value of a lawyer's services is the result of his labor; a charge must be adjusted to the benefit in a measure, at all events, so you inquire what was the benefit to this defendant rendered by this plaintiff," etc., was manifestly correct, especially when considered with reference to plaintiff's testimony, that he considered this largely a contingent case, and defendant was told the amount of his charge of \$20,000 to \$25,000 would be dependent largely on his being successful or unsuccessful. (*In re Hynes*,

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105 N. Y. 560; *Garfield v. Kirk*, 65 Barb. 464; *Betts v. Betts*, 4 Abb. [N. C.] 317; *People v. S. Bank*, 10 id. 15; *Marsh v. Holbrook*, 3 Abb. Ct. App. Dec. 176.) It is sufficient in an appellate court that the general charge lays down the law correctly as a whole. An appellant is bound to show substantial error, and abstract consideration of isolated or fragmentary parts of the charge cannot be permitted to prevail as presenting error requiring reversal. (*Hickenbottom v. R. R. Co.*, 122 N. Y. 91; *Losee v. Buchanan*, 51 id. 492; *Caldwell v. S. Co.*, 47 id. 282; *Sperry v. Miller*, 16 id. 412; *Carpenter v. T. Co.*, 71 id. 578; *R. Co. v. Estil*, 147 U. S. 614.)

Points on appeal from order :

If there was no "proceeding" against the respondent in the Superior Court of Massachusetts, there could have been no "disbarment," and his testimony upon the trial was true. If respondent believed or had reasonable cause or foundation to believe he had never been disbarred, then his testimony was not willful nor corrupt, but may be fairly attributed to mistake or infirmity, and the testimony being also immaterial, together with its being no surprise to defendant, no just reason existed why a new trial should have been granted. (*Deering v. Metcalf*, 74 N. Y. 501; *Dynes v. Hoover*, 20 How. [U. S.] 82; *Ditcher v. Dennison*, 11 Moore's P. C. 324.) Under the Constitution and laws of Massachusetts in 1864, an attorney could only be removed from his office, "stricken from the rolls," or "disbarred" by the Supreme Judicial Court, or the Superior Court, upon charges of deceit, malpractice or other gross misconduct, filed in court, and after notice to answer to such charges or appearance by the attorney, and a judicial hearing on trial by the court. The power is conferred upon the court and not upon an individual judge of the court, and the judgment of removal must be a judicial act. (*U. S. v. Clark*, 1 Gall. 497; *U. S. v. Arredondo*, 6 Pet. 709; *Sheldon v. Newton*, 3 Ohio St. 498; *Devane v. Calching*, 2 How. [Miss.] 884; *Seal v. Dorsee*, 9 Moore's P. C. 411; *King v. Wardens*, 5 M. & S. 254; *Houlden v. Smith*, 14 A. & E. [N. S.] 841; *Queen v. Bolton*,

L. R. [1 Q. B.] 71; Prescott's Trial, 164, 165, 178; *Dewhurst v. Coulthard*, 3 Dal. 409; *Calder v. Halket*, 3 Moore's P. C. 28.) The office of an attorney is a right, license, freehold or privilege, and wherever the rules of the common law prevail, no person once vested with this right can be deprived of it without "due process of law." (*Harcourt v. Fox*, Show. 428; 2 Peckwell's Cases, 89; *Ex parte Hennen*, 13 Pet. 259; *Hurst's Case*, 1 Levintz, 75; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, Id. 277; *Ex parte Austen*, 5 Rawle, 194; *Vise v. County of Hamilton*, 19 Ill. 78; *In re Dorsay*, 7 Porter, 381; *Ex parte Cooper*, 22 N. Y. 67; *Saxton v. Stowell*, 11 Paige, 526; 22 Wend. 656; *In re Attorney*, 83 N. Y. 164; *Ex parte Brewster*, 12 Hun, 109.) "Due process of law," as applicable to the divesting of an attorney of his office or license, or of any other person of a freehold office, does not mean the exercise of arbitrary or discretionary power by a judge, but of the summary jurisdiction of the court. And the summary jurisdiction of a court does not mean that a judge of the court can lawfully exercise an arbitrary power, will or discretion, without any process of law at all, but it is the exercise of the discretionary power vested by the law in the court to proceed upon summary process, in those cases wherein the law has deemed the exercise of such power to be necessary by the court, without the intervention of a jury. (*People v. Turner*, 1 Cal. 151; *People v. Smith*, 3 Caines, 221; *Chapman's Case*, 11 Ohio, 430; *In re Pitman*, 1 Curtis C. C. 131; *Darby's Case*, 3 Wheeler Cr. Cas. 5; *Bradley's Case*, 19 Mass. Law Rep. 430; *Gorham v. Luckett*, 6 B. Mon. 146, 638; *Van Zandt v. Waddell*, 2 Yerg. 260; *Rex v. Young*, 1 Burr, 563; *Witman v. Ely*, 4 S. & R. 265; *Harvie v. Cammack*, 6 Dana, 243; *Piper v. Pearson*, 2 Gray, 120; *Lewis v. Garrett*, 5 How. [Miss.] 434; *Taylor v. Porter*, 4 Hill, 145; *Norman v. Herst*, 5 W. & S. 193; *Ervin's Appeal*, 16 Penn. 263; *Wynehammer v. People*, 3 Ker. 392; *S. Co. v. Foster*, 5 Ga. 218; *Martin v. Marshall*, Hobart, 63; *Com. v. Davis*, 11 Pick. 432-438; *Com. v. Parker*, 2 id. 553; *Com. v. Phillips*, 16 id. 211; *Com. v. Holly*, 3 Gray, 458; *Greene v. Briggs*,

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1 Curtis C. C. 350; *Murray v. L. Co.*, 18 How. [U. S.] 280; *Bank of Columbia v. Oakley*, 4 Wheat. 235; *Ex parte Ramshay*, L. R. [18 Q. B.] 187; *Downes v. G. J. R. Co.*, 3 H. L. 759.) There was no waiver by the attorney's appearance before Judge BRIGHAM. A person may be in the court room, and yet not in court; and no jurisdiction as a court could be acquired by said justice by said attorney's presence there; and a precautionary effort to protect and secure rights could not be tortured into acquiescence to illegal and arbitrary action by a judge. (*Webster v. Com.*, 5 Cush. 404; *Com. v. Andrews*, 3 Mass. 133; *Beaudry v. Mayor*, 11 Moore's P. C. 426; *Crepps v. Durden*, 1 Smith's L. C. 848; *Re Bishop Natal*, 3 Moore's P. C. [N. S.] 115; Broom's Maxims [4th Lond. ed.], 139.) It is essential to a conviction that it be founded upon a proceeding against a person. It is likewise essential to a conviction that it be a judicial act, and it is against all justice and decency that a man should act both as accuser and judge. (*Rex v. Lediard*, Sayers, 6; *Dynes v. Hoover*, 20 How. [U. S.] 82; *Ditcher v. Denison*, 11 Moore's P. C. 324; *Queen v. Smith*, L. R. [5 Q. B.] 621; *Gorham v. Luckett*, 6 B. Monr. 163-166; *Capel v. Childs*, 2 C. & J. 558; *Bonaker v. Evans*, L. R. [16 Q. B.] 171; *Ex parte Fischer*, 6 Leigh, 619; *Howard v. Gossett*, L. R. [10 Q. B.] 381; *Mitchell v. Harmony*, 13 How. [U. S.] 146; 1 Bishop's Civ. Pro. § 1001; Broom's Maxims [3d Lond. ed.], 10; *Devane v. Calching*, 2 How. [Miss.] 884; *Rex v. Holland*, 5 T. R. 607; *Queen v. S. Co.*, 10 H. L. Cas. 404; *Rex v. Wheatman*, Doug. 346; *Williams v. Bishop of Salisbury*, 2 Moore's P. C. [N. S.] 375; *Reg. v. Baines*, 2 Ld. Raym. 1273; *Queen v. Bethel*, 6 Mod. 17; *Kendall v. Stokes*, 12 Pet. 619.) A preliminary inquiry, inquest or investigation, in order to ascertain facts, is not a judicial inquiry or hearing or trial. Nor will such preliminary inquiry or investigation obviate the necessity of proceeding regularly in court in order to establish a valid judgment divesting a party of any freehold, office or other legal right; for a party has a right to have a case against him decided

secundum allegata et probata in a suit or proceeding regularly constituted, which suit or proceeding is commenced only when the accused is served with a citation to appear at a certain time and place, before a competent court, to answer definite charges preferred against him. (*Ditcher v. Denison*, 11 Moore's P. C. 324; *Bowerbank v. Bishop of Jamaica*, 2 id. 470; *Bonaker v. Evans*, L. R. [16 Q. B.] 162; *Willis v. Sir G. Gipps*, 5 Moore's P. C. 379; *Emerson v. Justices, etc.*, 8 id. 157; *Rex v. Town of Liverpool*, 2 Burr. 734; *Rex v. Cambridge*, 2 Ld. Raym. 1348; 1 Strange, 557; *Harvey v. Tyler*, 2 Wall. 342; *Lessee of Walden v. Craig's Heirs*, 14 Pet. 154; *People ex rel. v. Barry*, 29 Pac. Rep. 904; *Perry v. State*, 2 Greene, 551.) The paper presented on motion was not the record of a judicial act or judgment of the Superior Court of Massachusetts entitled "to full faith and credit," for it has none of the elements and characteristics of a record, and it is manifest on its face there was no subject-matter or person before the court. (*Reg. v. Dayman*, 7 El. & B. 672-676; *Crepps v. Durden*, 1 Smith's L. C. 848; *Gorham v. Luckett*, 6 B. Monr. 163; *Queen v. Smith*, 5 Q. B. 621; 2 Salk. 511; Skinner's Rep. 522; *Burdett v. Abbott*, 14 East, 106; *Reg. v. Baines*, 2 Ld. Raym. 1273; Statute, 25 Edw. I, chap. 2; *Capel v. Child*, 2 C. & J. 577; *Goddard v. Coffin*, Davies C. C. 383; *State v. Bennett*, 4 D. & B. 43; 3 Black. Comm. §§ 395, 396; 1 Coke Inst. 39 A; *Smith v. Moore*, 3 How. [Miss.] 42; *Wright v. Delafield*, 25 N. Y. 268; *Regina v. Bailiffs of Ipswich*, 2 Salk. 434; *Deering v. Metcalf*, 74 N. Y. 501.) The paper styled a "record of disbarment," if it had been produced at trial, could in no way have been admitted to have impeached the plaintiff's testimony. And such testimony was in no way material, the attorney's reputation in New York, the state in which he lived and practiced, being alone material. (*Tompkins v. Wadley*, 3 N. Y. Supp. 424; *Sims v. Sims*, 75 N. Y. 466; *Greaton v. Smith*, 1 Daly, 387; *Blakeman v. Rose*, 18 Wend. 146; It was not that Judge BRIGHAM's act was in excess or beyond jurisdiction, but it was without the inception of jurisdiction.

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No jurisdiction then and there existed. It was the exercise of arbitrary and usurped power by an individual, holding the office of a judge without any of the forms or safeguards or sanctities of law. (*Queen v. Bethel*, 6 Mod. 17; *Shriver's Lessees v. Linn*, 2 How. [U. S.] 59; *Mitchell v. Foster*, 4 P. & D. 154; 12 Ad. & El. 472; *Thomas v. Hudson*, 14 M. & W. 363; *Lange v. Benedict*, 73 N. Y. 12; *Honldon v. Smith*, L. R. [14 Q. B.] 841; *Calder v. Halkett*, 3 Moore's P. C. 28; *Guhan v. Lafitte*, Id. 382; *Hill v. Bigge*, Id. 465; *Miller v. Hope*, 2 Shaw's App. Cas. 125; *Ferguson v. Kinnonill*, 9 C. & F. 896; *Dicas v. Brougham*, 6 C. & P. 249; *Kining v. Buchanan*, 8 C. B. 271; *Watson v. Bodell*, 14 M. & W. 70; *Beaurain v. Scott*, 3 Camb. 388; *Ackerly v. Parkinson*, 3 M. & S. 411; *Garnett v. Ferrund*, 9 Dowl. & Ryl. 670; *Gossett v. Howard*, L. R. [10 Q. B.] 411; *Van Sandau v. Turner*, L. R. [6 Q. B.] 773; *Johnstone v. Sutton*, 1 T. R. 493; *Sutherland v. Murray*, Id. 538; *Welsh v. Marsh*, 8 East, 402; *Burdett v. Abbott*, 14 id. 1; *Mostyn v. Fabrigas*, 1 Cow. 161; *Bushell's Case*, 1 Mod. 119; *Hammond v. Howell*, 2 id. 219; *Miller v. Seare*, 2 W. Bl. 114; *Smith v. Bonchier*, 2 Stra. 993; *Groenveldt v. Burwell*, 1 Ld. Raym. 454; *Martin v. Marshall*, Hobart, 63; *Perkins v. Proctor*, 2 Wils. 386; *Floyd v. Barker*, 12 Coke Rep. 76 A; *Piper v. Pearson*, 2 Gray, 120; *Nixon v. Hill*, 2 Allen, 215; *Wise v. Withers*, 3 Cranch, 327; *Anderson v. Dunn*, 6 Wheat. 204; *Kendall v. Stokes*, 3 How. [U. S.] 789; *Mitchell v. Harmony*, 13 id. 144; *Dynes v. Hoover*, 20 id. 65; *Yates v. Lansing*, 5 Johns. 282; *Bigelow v. Stearns*, 19 id. 39; *Cunningham v. Bucklin*, 8 Cow. 178; *Horton v. Auchmoody*, 7 Md. 200; *Scovil v. Geddings*, 7 Ohio, 566; *Greene v. Mumford*, 5 R. I. 472; *Miller v. Grice*, 2 Rich, 27; *Lining v. Bentham*, 2 Bay, 1; *Bevard v. Hoffman*, 18 Md. 479; *Revill v. Pettit*, 3 Met. [Ky.] 314; *McMahon v. Learned*, 6 H. L. Cas. 970; *Rogers v. Dutt*, 13 Moore's P. C. 209; *Beau v. Bloom*, 3 Wils. 456; *Carrington v. Taylor*, 11 East, 511; *Thompson v. Gibson*, 7 M. & W. 456; *Peter v. Kendall*, 6 B. & C. 793; *Townsend v. Blewitt*, 5 How. [Miss.] 503; *Wammack v. Halloway*, 2

Ala. 31; *Palmer v. Fisk*, 2 Curtis C. C. 14; *Bruce v. Fox*, 1 Dana, 450; *Glen v. Hodges*, 9 Johns. 67; *Lynch v. Knight*, 9 H. L. Cas. 597.)

GRAY, J. This action was brought to recover the sum of \$23,000; as a balance claimed to be due to the plaintiff for professional services rendered to the defendant, in the capacity of his attorney at law. The answer admitted the employment of the plaintiff; but denied that his services were worth more than the sum of \$2,000, which had been paid to him. Upon the trial the nature of the services rendered was testified to. It appears that the plaintiff had subscribed the sum of \$125,000 to the capital stock of the Perry Stove Company, a corporation organized in Albany, N. Y. and, in part payment of his subscription, had transferred to the company certain foundry property, at a valuation of \$45,000, and had given to it his promissory note for \$10,000, which was held by a bank under discount. He was being pressed for the payment of the balance of his subscription and, becoming dissatisfied with the project, was desirous of being relieved of his agreement and of getting out of the matter entirely. To accomplish his release, he employed the plaintiff as his attorney and, negotiations for an amicable settlement failing, the latter commenced an action, in equity, for his client, to set aside the subscription and to compel a re-conveyance of the foundry property and the return of the note. The complaint was based upon charges of fraud and deceit in procuring the defendant to join in the corporate enterprise. Answers were made to the complaint, putting its allegations in issue; but, before the cause came on for trial, a compromise was effected between the parties. It is fair to infer from the evidence that it was made because of the delay which would ensue in organization and of the cloud which would or might be cast over the enterprise. The interests of the company were deemed better subserved by a settlement, than by a protracted litigation. As the result of the compromise, this defendant received back from the company his foundry property and his note; he sub-

scribed the sum of \$5,000 to the same corporate enterprise, but with a capitalization of \$300,000, instead of \$500,000; and the equity action he had instituted and the action at law against him to compel the payment of the balance of his subscription were discontinued. The plaintiff's own evidence as to the promise of the defendant to pay him \$25,000, in the event of a successful result, was flatly contradicted by the defendant and the evidence of lawyers examined by him upon the question of the value of the services, he had testified to performing for the defendant, was as flatly contradicted by that of lawyers examined in behalf of the defendant. As to the parties litigant, the question of an agreement to pay the sum of \$25,000, or any fixed sum, depended upon the credibility to be attached to their several statements; while the question of the value of the plaintiff's services, under the circumstances detailed, was apparently not much helped in its solution by the irreconcilable evidence of the expert witnesses. The jury, after being charged by the trial judge, rendered a verdict of \$10,000 for the plaintiff; being less than half of the plaintiff's claim. Whatever our opinion might still be as to the amount awarded by the jury, upon the evidence before them, we are concluded from any expression by their verdict and, if there was no error committed upon the trial, the judgment must stand.

At the conclusion of the charge, the defendant's counsel excepted "to that part of the charge in which the court charged that the main element of value is result." That exception is the sole error urged by the appellant as ground for reversal of the judgment below. The precise language of the trial judge, to which the exception related, was this: "But the main element after all in determining the value of a lawyer's services is the result of his labor." If this statement had stood alone and without anything which could be regarded as qualifying it, it would have been distinctly erroneous and misleading as to the law; and the defendant would have been entitled to a reversal of the judgment. The result of a lawyer's services is an element in determining their value

and it is, unquestionably, a very important one. Had the learned trial judge said that the result was one of the main elements, he would have been right. There are several other elements, which must be equally considered in determining the amount of an attorney's compensation, and unless the jury were instructed as to the importance of their consideration; or if they were so instructed, concerning the importance of the result attained for the client, as to mislead them into the belief that they were at liberty to base their estimate entirely, or principally, upon that result, there would have been distinct error. The general rule is that an attorney, in the absence of an agreement, deserves compensation according to the reasonable worth of his services. Of that the jury are the sole judges and, to arrive at their value, they may consider the nature of the services rendered, the standing of the attorney in his profession for learning, skill and proficiency, the amount involved and the importance to his client of the result. The reason why the result is one of the important factors in the consideration must be obvious. It not only is some evidence of the usefulness of the services; but, for its effects upon the situation of the client, relatively to what it had been, it must be conceded a degree of influence, in fixing the amount of the attorney's compensation proportioned to the nature and incidents of the result, in connection with the other considerations adverted to. The trial judge, in the previous portion of his charge, said to the jury that "several circumstances must enter into the computation" in estimating value and he proceeded to state them; reviewing, in connection with their statement, the evidence in the case. He had said that the professional reputation of the lawyer for ability and integrity; the difficulty and importance of the case; the amount of work and labor performed; the amount involved and the pecuniary ability of the client were to be considered and it was after a rather general discussion of these considerations, that he stated that "the main element after all in determining the value of a lawyer's services is the result." Despite what had been said by the judge, I should still hesitate to say that

the jury may not have been seriously misled by the undue emphasis laid upon the result, as a factor in the determination of the question of value. If there was nothing more we might very reasonably and justly hesitate to hold in this case, where the evidence was sharply conflicting upon the value of the plaintiff's services, that the jury were clearly instructed how to consider that evidence and by what legal rules they were to be guided in reaching a verdict upon the issues. But, in our judgment, the possibility of a belief by the jury that the judge was intending to lay down a rule of law, by the statement in question, was removed by the remark with which he followed up his statement. He immediately added that "a charge must be adjusted to the benefit, in a measure at all events. So you inquire what was the benefit to the defendant, rendered by this plaintiff. Undoubtedly a lawyer—and every lawyer is governed by that consideration—will not charge a client as much if the client be unsuccessful. * * * You must look to the benefit." And the judge showed that the result was all that this defendant had hoped for. Thus, the remarks which followed upon the remark, which was excepted to, so qualified it as to correct its generality of expression and showed that what was meant was that the lawyer's charge must be adjusted in a measure to the benefit resulting to his client. The jury could not have failed then to understand that while the result was an element of considerable importance to be considered, it was only one of several elements which had been discussed by the judge. We must read these remarks as they were heard; that is, consecutively, and as the summing up by the judge of the various considerations which the jury were to entertain. We do not think that it would be just to order a reversal of this judgment upon an exception taken to the remark of the trial judge; which, however erroneous if standing by itself, was so coupled with other observations, as to accomplish a modification of its apparent emphasis and to give a more correct definition of the true relation which the result of services rendered bears to the consideration of the question of their actual value. The defendant, by an appro-

priate request to charge, might very easily have covered the point, if he thought it left in doubt. As the case stands, we cannot say that there was such error in the charge as to justify us in ordering a new trial of the issues.

The other appeal by this defendant concerns the denial of his motion for a new trial. After the recovery by the plaintiff of a judgment against the defendant, the latter's attorney, upon his affidavit and upon the proceedings had, moved the court for an order granting a new trial. His affidavit stated that, prior to the trial, he had heard rumors that the plaintiff had been disbarred at some time in Boston, Massachusetts; and that, at the time of the trial, he was unable to procure any evidence of the fact. It then gave, from the testimony of the plaintiff upon the trial, the following extract from his cross-examination :

"Q. Were you a member of the bar in Boston ?

"A. I was.

"Q. Are you now ?

"A. I am.

"Q. Never disbarred in Boston ?

"A. Never. I brought a certificate when I left Boston — from the clerk — from the chief justice, which I have in my hat. I was a member of all the courts."

The affiant then stated that he had procured "the record of disbarment of plaintiff;" which was annexed to his affidavit. The record referred to contained an order of the Superior Court of Massachusetts, held within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of October, 1864, the Hon. L. F. BRIGHAM, a justice of said court, presiding, and entitled "in the matter of Samuel H. Randall, an attorney at law etc." After a recital of certain facts, which were found by the court to constitute a "violation of his oath of office as an attorney at law" and to render him "guilty of malpractice and gross misconduct in his office," it was ordered that "for these causes he is removed from the office of an attorney at law within this commonwealth." In opposition to the motion, Randall submitted an

affidavit; in which he swore that the portion of his testimony referred to was true and that he was never disbarred by the Superior Court, or by any other court. He proceeds in the affidavit with statements regarding the validity of the proceedings in the Superior Court, to the effect that no charges had been filed; that the court had no jurisdiction and that he had never been validly removed, as proved by the annexed certificates of the clerks of the Superior Court and of the Supreme Judicial Court of Massachusetts. The certificate of the clerk of the Superior Court showed that there were no charges on file against Randall and that upon its docket was simply an entry, made in January, 1865, of the order of October, 1864, made by Judge BRIGHAM. The certificate of the clerk of the Supreme Court, dated in April, 1866, stated the date of Randall's admission to practice; that there was no evidence of his having been removed from his office of attorney and that his name still appeared upon the records as such. Upon the facts shown, it was Randall's claim that, never having been tried upon any charges, as he was entitled to by the law, the order of the Superior Court was ineffectual and without jurisdiction in the judge to make; that it was neither a court order, nor a record of disbarment and that it affirmatively appeared, from the clerk's certificate produced, that his name was still upon the roll of attorneys and that he had not been disbarred. For this defendant, Packard, it was claimed that the record showed a disbarment, and, in support of the argument, the case of *Randall v. Brigham* (7th Wallace U. S. Rep. 523) was cited. That was an action brought by Randall against Judge BRIGHAM, of the Superior Court of Massachusetts, to recover damages for his alleged wrongful acts, and the ground relied upon appears to have been, in substance, that the judge's acts were not judicial, for want of jurisdiction, and, hence, he could claim no immunity from liability because of his judicial office. The case came up to the United States Supreme Court, in 1868, and it was there held that the Superior Court of Massachusetts was a court of general jurisdiction, having authority to admit

and to remove attorneys; that the order of Judge BRIGHAM was an order of the court; that it was the result of an inquiry into his conduct before that court upon notice and that the notice through a letter of the judge to Randall to appear, however informal, was sufficient to set in motion the authority of the court and to call upon Randall to explain the charge against him. The Circuit Court below had directed a verdict for Judge BRIGHAM, the defendant, and the Supreme Court found no error in that ruling. That decision must be regarded as establishing, only, that the proceeding instituted in the Superior Court by Judge BRIGHAM was valid in all respects, so far as it operated upon Randall as a trial and a judgment. The question, then, which was presented to the court below, upon the hearing of the defendant's motion, was whether the plaintiff Randall, in denying that he had been disbarred, had sworn falsely upon the trial and whether, if that was the fact, there should be a new trial ordered. Of course, there was no ground of any newly discovered evidence; for the affidavit of the defendant's attorney shows that he had heard, before the trial, of rumors that defendant had been disbarred. We may observe, in passing, that, if the defendant intended to rely for defeating the plaintiff's claim upon evidence of his having been disbarred, he should have had his proofs in readiness. It appears that he was not forced to proceed with the trial and that he refused to consent to any delay. However, as the question came before the court below, it was one of fact, to be determined upon the proofs adduced. There had been no conviction, establishing conclusively the commission of perjury by the plaintiff, and it was for the court to consider and to say, upon the proofs on either side, whether the plaintiff had sworn falsely upon some material point. It decided adversely to the defendant's application and refused a new trial. In arriving at that decision, it was not without the support of sufficient evidence and, as the General Term of the court have affirmed the decision of the Special Term, we think the matter ended there and ceased to be further reviewable in this court. It was not

only a matter calling for a consideration by the court of evidence both ways; but it was an application addressed to its discretion.

We fully recognize the fact that the Superior Court record established that plaintiff had been found guilty of malpractice and of gross misconduct in his professional capacity, while in practice as an attorney at law, in Massachusetts; but, upon all the evidence, it was open to question whether that order had ever become effective as a removal of Randall from office. Upon that point, opinions might differ. That the plaintiff evaded giving exact information in answer to counsel's question is very true; but, under the peculiar circumstances, he was entitled to give his answer in accordance with his opinion as to the legal result of the proceedings taken for his disbarment. Further questioning by defendant's counsel might, possibly, have elicited from Randall the facts, as they actually occurred in Boston. While he could not truthfully have testified that no judgment or order for his removal from his office had ever been made and entered; yet, inasmuch as it seemed to be a debatable question, admitting of opposing inferences, whether he had ever been actually disbarred, in the legal sense of the expression, in stating that he had not been, it cannot be said, as matter of law, that he swore falsely. Our conclusion upon this appeal, therefore, is that the decision of the court below, upon this defendant's application for a new trial, is not reviewable here.

The judgment and the order, from which these two appeals have been taken, should be affirmed, with costs.

All concur, except FINCH, J., dissenting, and PECKHAM, J., not voting.

Judgment accordingly.

EDWIN B. ROOT, as Administrator, etc., Respondent, v.
CHARLES A. BORST, Appellant.

In an action to recover possession of a manuscript catalogue of stars, which was made by defendant and his two sisters working to aid him at his request, and was written upon paper purchased and prepared by him, P., the original plaintiff, claimed title on the ground that the work was done for him, by defendant as his servant. This was denied by defendant. P. was director of an observatory, and defendant was his assistant. On the trial defendant testified that in 1885 he, in the presence and hearing of P., showed the catalogue to H., stating that it was his (defendant's) work, and he had done it at the suggestion of P. that he should do some special work as his own. H., as a witness for defendant, corroborated his testimony as to the conversation. P. was thereafter permitted, under objection and exception, to show that at a meeting of the Academy of Science in 1886, at which H. was present, he read a paper entitled "Catalogue of Stars," and was also permitted to read certain letters written to him in 1886 by H. referring to his catalogue of stars. These letters were objected to on the ground that the attention of H. when a witness had not been called to them. *Held*, that the reception of the evidence was error.

(Argued March 1, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of Christian H. F. Peters, plaintiff's intestate, entered upon a decision of the court on trial without a jury. Peters died after judgment and plaintiff was substituted.

This action was brought to recover certain books and papers termed a Star Catalogue.

The facts, so far as material, are stated in the opinion.

William Kernan for appellant. The letters of Professor Hall to Dr. Peters, offered on behalf of the plaintiff and admitted against the objection on behalf of the defendant, were not competent evidence. (*Stacy v. Graham*, 14 N. Y. 492; *Pendleton v. E. S. Co.*, 19 id. 13; *People v. Stevens*, Id. 549; *Trustees, etc., v. B. F. Ins. Co.*, 28 id. 153, 160;

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Howard v. Howard, 18 Wkly. Dig. 330; *McCollock v. Dobson*, 133 N. Y. 114; *Fitch v. Kennard*, 46 N. Y. S. R. 271; *Hubbard v. Briggs*, 31 id. 518, 536; *Holmes v. Anderson*, 18 Barb. 420.)

Elihu Root for respondent. The letters of Mr. Hall were admissible, and the objection of the defendant was properly overruled. (*Romertze v. E. R. N. Bank*, 49 N. Y. 577; *Byrnes v. Byrnes*, 102 id. 4; *Stephens v. People*, 19 id. 549; *Pendleton v. E. S. D. Co.*, Id. 13; *Morris v. Wadsworth*, 17 Wend. 103, 119; *Bedell v. Powell*, 13 Barb. 183, 184; *People v. Taylor*, 3 Cr. Rep. 297, 300; Code Civ. Pro. § 1337; *Reynolds v. Robinson*, 82 N. Y. 105, 106; *Healy v. Clark*, 120 id. 642; *Coffin v. Hollister*, 124 id. 645; *Goodsell v. W. U. T. Co.*, 130 id. 446; *Lamb v. C. & A. R. R. Co.*, 2 Daly, 454, 475; *Forrest v. Forrest*, 25 N. Y. 501, 510.) The evidence fails to establish the defendant's claim of title to any of the property in question. (*Silsbury v. McCoon*, 3 N. Y. 379; *Palmer v. De Witt*, 47 id. 532; *Tabor v. Hoffman*, 118 id. 30.) The judgment should be sustained if substantial justice has been done and it is warranted by the evidence. (*Stilwell v. M. L. I. Co.*, 72 N. Y. 385, 388; *Woodruff v. McGrath*, Id. 255; *Baird v. Mayor, etc.*, 96 id. 567; *Lowery v. Erskine*, 113 id. 52, 55; *Fellows v. Northrup*, 39 id. 117, 119; *Crane v. Baudouine*, 55 id. 256, 264; *Burgess v. Simonson*, 45 id. 225, 228; *Starbird v. Barrons*, 43 id. 200; *Whitman v. Foley*, 125 id. 651; *Roosa v. Smith*, 17 Hun, 138, 139; *Westerlo v. De Witt*, 36 N. Y. 339; *Sherwood v. Hauser*, 94 id. 627; *Griswold v. Learned*, 9 N. Y. S. R. 242, 244; *C. N. Bank v. Crosby*, 16 id. 226; *Laidlaw v. Slayback*, 23 id. 259; *Eighme v. Strong*, 15 Civ. Pro. Rep. 119.)

FINCH, J. We are satisfied that the paper read by Dr. Peters before the National Academy of Science, and the letters addressed to him by Professor Hall were erroneously admitted in evidence, and that the vital question on this appeal

is whether those errors can be disregarded as not materially affecting the result, and working no appreciable injury to the defense. That inquiry makes necessary some understanding of the facts, and of the character and tendency of the erroneous evidence.

The form of the action was in the nature of a replevin, and the plaintiff Peters sought to recover possession of a manuscript catalogue of stars, the ownership of which he claimed. That manuscript was the work of the defendant and his two sisters, written upon paper prepared and paid for by him, steadily and continually kept and retained in his own possession, and which must be deemed to be his unless Peters has in some manner established a title to it in himself. The burden rests on him to show the acquisition of such a title, and any doubt about it must go to the benefit of the defendant.

The proof shows that Peters in his lifetime was director of the Litchfield Observatory at Hamilton College. He taught the class in astronomy and received from the college a salary of fifteen hundred dollars, which was provided by the endowment of Mr. Litchfield, and which the college was unable to increase. The director's position was quite different from that of an ordinary professor. Beyond his work as a teacher he was expected to make original observations and investigations, to be published with the aid of the patron of the observatory or of other interested or generous friends, and so build up and broaden its scientific reputation. And since the college was financially unable to pay him anything approaching a reasonable salary, it may easily be inferred that the director would be allowed and expected to do for himself much work of his own for which he would not be accountable to the college, and which he could use or dispose of as he pleased. Such work Dr. Peters did. He gives us a description of it. Before coming to Clinton he began to make a collection of the positions of stars not on the general catalogues, but noted by different observers who had selected them out from that faint and unobtrusive swarm not enrolled in any advertised galaxy. His collection was not a catalogue fitted for publication, but a

gathering of loose material lacking arrangement in scientific order. His original motive for the collection and principal use of it seems to have been to aid in the preparation of charts of the stars, a work of great magnitude and importance; and also to furnish him with what he calls "comparison stars," which he likens to the monuments of the ordinary surveyor from which measurements are taken and courses run. Of these charts he had finished twenty, but had planned one hundred and eighty-two, and had before him in that direction the study and work of years. In addition he prepared for publication papers on the transit of Venus, and quite a serious investigation of solar spots.

The defendant graduated in 1881 and went into the observatory as an assistant. The exact character of his relation to the director and to the college is somewhat ambiguous and open to different inferences. He was appointed by the director and not by the college authorities, and seems not to have been regarded as a member of the faculty, and yet taught the classes in astronomy in the absence of the director with the explicit assent of the trustees. Peters regarded him as his servant, and looked upon everything done by the assistant as done for him personally and appurtenant to his interest and reputation: and yet it is obvious that the employment of an assistant originated with Mr. Litchfield who suggested it and promised to pay the necessary expense, acting in behalf of the college, assuming its appropriate burden, and notifying its treasurer of his purpose to pay the salary. He did pay it during his lifetime, although it was done through Peters, and to some extent, if not fully, the same payment was made after Mr. Litchfield's death by his son. It is quite probable that out of his own small salary, little more than enough to ward off starvation, Peters would have been very unlikely to have devoted one-third to the employment of an assistant. And yet it is very certain that Peters regarded Borst as his personal servant, and that the latter in the beginning drew no line of distinction between his work for the director personally and that which he did for him as one of the college faculty.

Borst put in shape for publication the manuscript relating to the solar spots; assisted in the observations and calculations necessary for the star charts; and continued the entry of star positions in the books devoted to their collection.

But, as Peters had liberty to use his own time for his own purposes, so far as it was not absorbed by his collegiate duties, so also Borst was free to use for himself the hours not due to the service which he owed Peters, and which belonged to himself alone: and this right, and the existence of such hours Peters recognized, because he advised Borst to do some valuable work for his own benefit and reputation. The star catalogue in controversy was beyond a doubt the product of those otherwise unoccupied hours which belonged to Borst personally and not at all to the college or to Peters; and the latter can have no title to it unless he can show an agreement that it should be prepared for him and become and be his property. For it is clear that he got no title to it by any work that he did upon it. His own loose collections may have helped somewhat, and his advice and suggestions more, but what he in fact did upon it was almost trifling, and is described by Professor Hall as adding little to the value of the manuscript: and the few emendations that he made and the faint show of interest in it which he displayed until he claimed title to it is entirely consistent with the ownership of Borst to which the latter testified.

There was no misunderstanding between the two for about three years. But in November of 1884 Peters testifies that he formed the purpose of using his loose material, already gathered in two volumes, for framing a star catalogue, scientifically arranged in the order of right ascension, and reduced to a common epoch, and set Borst at that work, who accepted the duty. The director is sure of the date, but upon the vital question of what he then said to Borst, or the latter said to him, he is unable to repeat a single word. The burden was on him to prove such an agreement; it was the decisive fact through which only he could derive a title; and yet he is unable to repeat a single phrase of the conversation. He

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does not remember where it was, and says : "I do not know what the talk was between me and him on that occasion," and says again : "There was no special talk," and adds : "I cannot give any conversation at any time between me and him in reference to it." And so, instead of the words of agreement, he gives us his understanding of what his rights were. That appears in his cross-examination where he testified "there was no regular talk because he had nothing to say about it. He was my assistant."

The defendant denies any such agreement and shows that he had already, at this alleged date, been busy for six months upon the star catalogue, and produces the papers indicating that fact. He tells us how he came to do it; that it grew from the suggestion of Peters himself, who advised him to undertake some special work out of which he might obtain personal reputation and scientific position, and who volunteered to aid and assist him in the preparation of the star catalogue which he selected for his own personal work. The director admits having given some such general advice, but denies its application to the manuscript in controversy.

At this point the contradictions are violent and cannot be reconciled. It is possible to see that Dr. Peters, regarding the defendant as his servant, in the habit and custom of appropriating Borst's work as done for him, might be mistaken in his memory and understanding of the facts relating to the star catalogue, but no such explanation will do for Borst. Not only must falsehood be charged upon him, but also a deliberate purpose and plan to take from the director what was his and deprive him of well-earned reputation. That is a solution of the conflict which should only stand upon clear and strong proof. That Borst, as a mere assistant of Peters, should not only help him during observatory hours, which we might very well expect, but should devote to his service all time of his own, working late into the night and absorbing every spare moment; that he should bring his two sisters to Clinton and demand of their love for him an enormous amount of labor and patient industry, only to magnify the reputation of Peters,

and on a salary of six hundred dollars a year; that he should have asked Peters to write a preface to the latter's own work; that he should have kept the results of his labors steadily and as a rule in his own personal possession instead of leaving it at the observatory and in the director's control; all this we must believe on the basis of the findings; and in connection with an amount of treachery and falsehood quite painful to contemplate. Of course we are not to review the conclusions of fact, but we are at liberty to say that the title in Peters to Borst's work was not so established as to make immaterial the receipt of illegal evidence bearing upon the result. Obviously, disinterested and patient judgments might differ as to the correct and proper inferences to be drawn, and comparatively slight matters might turn the scale. To the evidence improperly admitted we must now direct our attention.

The plaintiff was permitted to show that Dr. Peters was present at a meeting of the Academy of Science in Boston and at that meeting read a paper described as "No. 13. Peters, C. H. F. Catalogue of Stars from Various Astronomical Positions," and was also permitted to read certain letters addressed to him by Professor Hall. Borst had testified that in the summer of 1885 Hall was at the observatory, and was shown by the defendant the star catalogue here in question; that Hall spoke of it as involving a great amount of labor and Borst said it was "his work," and he had done it upon the suggestion of Peters that he should attempt some special work of his own; and that this occurred in the presence and hearing of Peters, whose only remark was as to the convenience of a wide margin to the manuscript. Thereafter Hall was sworn and he corroborated Borst in every particular except that he was unable to say that Peters was present at the moment of the conversation. On the cross-examination of Hall he was asked if he was present at the meeting of the academy in 1886; if Peters was there; and then if the paper referred to was read; to which he answered in the affirmative, the defendant objecting to the production of the pamphlet and to the reading of the paper from it. This evi-

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dence in no manner contradicted or tended to contradict the witness. It simply proved the unsworn declaration of Peters in the absence of Borst, and in his own behalf. It showed that he stood before the academy claiming to be the author of a catalogue of stars, and was made the basis of an unwarranted argument by the court that Hall must have been mistaken, as if the fact that Peters claimed the catalogue in 1886 was any proof that Borst did not claim it in 1885. In addition Hall's letters to Peters, written in March, April and October of 1886, and speaking of his catalogue of stars, were admitted in evidence and made the basis of an argument that Hall could not have understood that Borst claimed the catalogue as his in August, 1885, when in the next spring the witness was referring to it as the work and property of Peters. These letters were specifically objected to upon the ground that the attention of the witness had not been called to them, and in Hall's absence were distinctly admitted as a part of his cross-examination. (*McCulloch v. Dobson*, 133 N. Y. 114.) The learned counsel for the plaintiff argues that the letters were not offered to contradict Hall, but on that theory they were not admissible at all, for the argument that Borst had put in evidence Hall's understanding that Borst owned the catalogue has no foundation in fact. He was neither asked what his understanding of the actual ownership was nor did he testify to any such understanding. Question and answer were confined to the actual fact of an actual conversation, and no inference of what the witness understood from it as to the fact of ownership was asked or given. Hall's opinion about it was totally immaterial unless for purposes of contradiction, and for that no foundation was laid. It was used for that purpose. The opinion of the court puts great stress upon it. It argues out from it a disbelief of the fact of the conversation sworn to by both Borst and Hall, and gives it decided weight in the discussion. The case on the facts is not at all so clear as to justify a disregard of these errors. It presents a very close and difficult question by reason of the subject-matter involved and the peculiar relations existing between the par-

ties, and we do not feel justified in saying that the result might not be different if no improper evidence should be received.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur, except GRAY, J., not voting.

Judgment reversed.

WILLIAM H. KNAUSS, Appellant, v. GOTTFRIED KRUEGER
BREWING COMPANY, Respondent.

The provision of the statute of New Jersey in relation to brokers selling real estate, which prohibits them from claiming commissions unless their authority to sell is in writing, applies only to brokers who are themselves authorized to make a sale; it does not apply to one given no authority to fix the price or terms of sale, but who is simply employed to find and bring a possible purchaser to the vendor and is to receive compensation in case a sale is effected

So, also, the rule that a broker employed to buy or sell, who is invested with any discretion or upon whom his employer has a right to rely for the benefit of his skill or judgment, loses his right to compensation if he agrees to act in a similar capacity for the other party, does not apply to one simply employed to bring the parties together, and such an employment by the party desiring to sell does not prevent the acceptance of a similar employment from one wishing to purchase, and there is no violation of duty in such case on the part of the employee in agreeing for commissions from each party, or in failing to notify the one of his employment by the other.

Holcomb v. Weaver (136 Mass. 265); *Carman v. Beach* (63 N. Y. 97); *Murray v. Beard* (102 id. 508); *E. S. Ins. Co. v. A. C. Ins. Co.* (138 id. 446), distinguished.

Knauss v. Gottfried Krueger Brewing Co. (62 Hun, 46), reversed.

(Argued March 2, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of November, 1891, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Statement of case.

Andrew Wesley Kent for appellant. No agreement, express or implied, was made in New Jersey. (*Waldron v. Richings*, 9 Abb. Pr. [N. S.] 359.) The contract was to be performed in New York; therefore, the law of New York governs its construction and effect. (*Jewell v. Wright*, 30 N. Y. 259; *Dickerson v. Edwards*, 77 id. 573.) The statute of New Jersey is not available as a defense. (*Graves v. Cameron*, 9 Daly, 152.) Plaintiff's relation to both buyer and seller was that of middleman. (Story on Agency, § 31; *Jones v. Schaffer*, 105 N. Y. 289; *E. Ins. Co. v. A. Ins. Co.*, 138 id. 449.) Plaintiff's relation to the buyer and the seller being that of middleman, he may receive compensation from either, where each has agreed to pay, even without knowledge of the other. (*Rupp v. Sampson*, 16 Gray, 398; *Siegel v. Gould*, 7 Lans. 179; *Balheimer v. Reichardt*, 55 How. Pr. 414; *Herman v. Martineau*, 1 Wis. 136; *Stewart v. Mather*, 32 id. 844; *Barry v. Schmidt*, 57 id. 172; *Orton v. Schofield*, 61 id. 382; *Ranny v. Donovan*, 78 Mich. 318; *Montross v. Eddy*, 94 id. 100; *Manders v. Craft*, 32 Pac. Rep. 836; *Mullen v. Kietzel*, 7 Bush, 253; *Green v. Robertson*, 64 Cal. 75.) The averments of the complaint are sufficient to justify a recovery as middleman. (*Velie v. N. C. Ins. Co.*, 12 Abb. [N. C.] 309; *Rogers v. N. Y. & T. L. Co.*, 134 N. Y. 219; *Moffat v. Fulton*, 130 id. 514.) The contract alleged in the complaint was that of middleman; the contract proven on the trial was that of middleman, and the contract conceded by defendant to have been made was that of middleman. The defendant did not plead any illegality in the transaction out of which the cause of action arose. Defendant did not plead that plaintiff sustained such a relation to Bliss as to preclude plaintiff's recovery against defendant, consequently such a defense was not available on the trial. (*Milbank v. Jones*, 127 N. Y. 370, 141 id. 347.)

Louis Marshall for respondent. The plaintiff was employed and paid by Bliss, who was, as the defendant claims, the broker of the purchaser, or, as the plaintiff claimed,

the purchaser himself. His employment by Bliss was not disclosed to the defendant. Under these circumstances the plaintiff cannot recover commissions of the seller. (*Carman v. Beach*, 63 N. Y. 97; *Story on Agency*, 31; *Farnsworth v. Hemmer*, 1 Allen, 494; *Clafin v. F. & C. Bank*, 25 N. Y. 293; *Gardner v. Ogden*, 22 id. 874; *Murray v. Beard*, 102 id. 508; *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 14 id. 85; *Ewell's Evans on Agency*, 14; *Greenwood v. Spring*, 54 Barb. 375; *Neuendorff v. W. M. L. Ins. Co.*, 69 N. Y. 389; *Raisin v. Clark*, 41 Md. 148; *Walker v. Osgood*, 98 Mass. 348; *Smith v. Townsend*, 109 id. 500; *Rice v. Wood*, 113 id. 133; *Bellman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Penn. St. 256; *Morrison v. Thompson*, L. R. [9 Q. B.] 480.) The contract of employment was made in the state of New Jersey and is void by the Statute of Frauds of that state. (*Arnold v. Angel*, 62 N. Y. 508.) It was not necessary for the defendant to affirmatively allege, by way of defense, that the appellant occupied toward Bliss such a relation as to disentitle him to compensation from the respondent. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 354; *Weaver v. Bardeen*, 49 id. 286; *Hier v. Grant*, 47 id. 278; *Knapp v. Roche*, 94 id. 333; *Gilman v. Gilman*, 111 id. 205; *Terry v. Munger*, 49 Hun, 560.) The grounds upon which the motion for a non-suit was based were sufficient to raise the question of plaintiff's inconsistent employment by Bliss; but, even assuming them to have been inartificially stated, the respondent has the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, which could not have been there obviated. (*Scott v. Morgan*, 94 N. Y. 515; *Allard v. Greasert*, 61 id. 4; *Simar v. Canaday*, 53 id. 298; *Newcomb v. Clark*, 1 Den. 226; *Stevens v. Hyde*, 32 Barb. 171.) Assuming that the plaintiff was employed by the defendant to secure for its officers an introduction to Bliss, to enable them to negotiate a contract for themselves, and that the defendant regarded him as a middleman only, yet, since he did not stand entirely indifferent between the parties, and without defendant's

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knowledge acted as the active adviser of Bliss, for a consideration, he has forfeited his right to compensation from the defendant. (Mechem on Agency, § 973.) It is not incumbent upon the defendant to show actual injury to it in consequence of the plaintiff's double dealing. It is sufficient to show the existence of an opportunity of injury, the temptation to favor one party at the expense of the other. (*Harrington v. V. G. D. Co.*, L. R. [3 Q. B. Div.] 549.)

PECKHAM, J. This action was brought to recover for services alleged by plaintiff to have been performed by him for defendant in regard to the sale of the brewery owned by the defendant, to one Robert Bliss or his assignee.

The answer put the employment in issue and denied that any service had been performed by, or that any sum was due to the plaintiff touching the subject of such sale. The complaint was dismissed upon the trial and the General Term has affirmed the judgment of dismissal.

Upon looking through the record containing the evidence given on the trial it is clear that the admission made by counsel for respondent in his brief, "that the action was, in fact, tried upon the evidence in disregard of the pleadings," has a good deal of support. We think it is too late to claim that the plaintiff must be judged entirely by his complaint, as if it had alleged his employment by defendant as a broker in the strict sense of the word, to obtain a purchaser of the brewery upon terms in regard to which he had some discretion. His evidence upon the subject given at the trial does not prove any such contract, and there was no evidence given which contradicted him. It showed that he was claiming compensation from the defendant because of his having introduced the president of defendant to Mr. Bliss, with whom or with whose assigns the defendant subsequently completed a sale of the brewery for the sum of \$1,822,000.

It is our duty to review the case in the light of the evidence given for the plaintiff, and if there were evidence of any employment substantially within the general scope of the alle-

gations of the complaint, we think it should have been submitted to the jury, unless there were some other fact which also appeared and which constituted a defense to the action. The record shows there was evidence of the employment of the plaintiff for the mere purpose of bringing the possible buyer and seller together, and with the understanding that if a sale were to result the plaintiff was to have some compensation from the defendant for his services. The plaintiff testified that he was to have nothing to do with fixing the price or the terms of sale; the principals were to do that part of the business; all he had to do was to bring them together, and if through their subsequent negotiations a sale should result, the plaintiff was to be entitled to some compensation. The real defense which is sought to be maintained is that while acting for the defendant in a matter in which trust and confidence were reposed in him and where defendant relied upon his unbiased judgment, the plaintiff was at the same time, but unknown to the defendant, in the employment of the proposed purchaser and bound by his duty to such purchaser to do all he could to forward the interests of the purchaser as against the seller. There was another defense interposed upon the trial which consisted of a New Jersey statute relating to brokers selling real estate and which prohibited them from claiming commissions unless their authority for selling was in writing. The brewery which was the subject of sale in this case was situated in New Jersey and it was urged that the statute applied to the contract proved.

On this point we are of opinion that the statute has no application. It in terms refers to those brokers who are themselves authorized to make the sale or exchange of the lands, and here the proof is uncontradicted that the plaintiff had no such authority.

Upon the other question we think the defendant is clearly right as to the law, but we also think there is nothing in the evidence to make it applicable here.

We agree perfectly with the cases of *Carman v. Beach* (63 N. Y. 97) and *Murray v. Beard* (102 id. 508). The cases

upon the subject are also collected in the late one of *Empire State Insurance Co. v. American Central Ins. Co.* (138 N. Y. 446). It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill or judgment, in any such case an employment of the broker by the other side in a similar capacity, or in one where by possibility his duty and his interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C. to find one who will sell his house to C. upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other.

Now, this, in substance, is what, according to the plaintiff's evidence, he contracted to do with these parties. He was employed by Bliss to see if he could not obtain customers who would sell their breweries upon terms to be agreed upon by the principals themselves, and he was employed by defendant to introduce its president to some one who wished to purchase, but the terms and all else regarding the contract were to be agreed upon between defendant and the purchaser. There is a piece of evidence which defendant claims is fatal to this view, and shows that the plaintiff violated his duty in concealing or in not mentioning his position with regard to Bliss. When the plaintiff came to the president of the defendant for the purpose of entering upon a discussion of the business and to learn whether he was desirous of selling, the plaintiff was inquired of by the president as to the responsibility of the parties the plaintiff spoke of as desiring or proposing to purchase, for it was said by the president that he did not care to go on with the matter or present it to others unless he knew

they (the persons mentioned by plaintiff) were responsible parties. The plaintiff says he assured the president that they were responsible. From that interview others followed, and finally the plaintiff introduced the president to Mr. Bliss, and the negotiations were thereafter conducted between them and lasted for quite a long time (a number of weeks) before they finally resulted in a sale effected upon terms made up and agreed upon entirely between the parties, without the slightest aid from or interference on the part of the plaintiff.

The defendant urges that the statement of plaintiff that the parties who were intending purchasers were responsible, was a statement upon which defendant was entitled to rely and to think that the plaintiff was giving the defendant the benefit of his own honest judgment uninfluenced by any concealed interest of his own in having the sale accomplished. We think this is an erroneous view of the situation. It is clear that the remark of the plaintiff in reference to the question of defendant's president was merely incidental, and that the question itself was in reality wholly beside the main question of sale. It was plainly an interrogatory for the purpose of learning in substance whether it was worth while to take the subject into consideration or whether it might not be mere irresponsible talk by men who had not the slightest intention or even power to carry out a sale. It had no bearing and was not asked for the purpose of obtaining knowledge upon the question whether or not to make a sale, or the terms or conditions of the sale if one were to be made. No reliance was placed upon the statement as a foundation for any condition of any contract subsequently made, nor was the question asked for any such purpose. This, we think, is apparent from the nature of the question and the circumstances under which it was asked and the facts that subsequently occurred. On its face the question manifestly had nothing to do with the subsequent transactions or with the material facts in the case. It was entirely preliminary in its nature and purpose. The answer might have determined the defendant's president to see the parties and then to make up his own opinion as to

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whether to go on or not, and as to the terms and conditions of the sale to be made.

The case differs so widely from that of *Holcomb v. Weaver* (136 Mass. 265) that we cannot think it necessary to lengthen this opinion by referring to all the material facts in the case cited. In regard to the subject of the double employment, if it be of a nature where by possibility the interests of the parties may be diverse, we agree that it cannot be upheld if concealed from knowledge. There is nothing of that kind appearing in the contract or agreement with either party as testified to by plaintiff. The fact that the sale was afterwards arranged between the parties exclusively upon terms and conditions agreed upon between them and without any reference to any previous statement of plaintiff, shows that it was wholly immaterial, and was not put or answered upon any supposition that it could or would in any manner influence the conduct of the defendant after entering upon the negotiations. The defendant claims the sale was not in fact made to Bliss but to a third party. We think the evidence shows the sale was effected between the parties as contemplated in the contract, and that upon such sale the plaintiff became entitled to a reasonable compensation for the services rendered. He admits in his evidence that the president never said to him what particular sum of money would be paid him, or what rate of commissions, and his compensation will have to be decided upon by the jury at a sum which shall be reasonable for the labor performed. All this has been said as to the case which the plaintiff made out upon the trial. The evidence for the defendant has not been heard, and, of course, no opinion is expressed or entertained as to the merits of the controversy. It is a question for the jury to determine after hearing both sides.

For that purpose the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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SARAH M. MYGATT et al., as Surviving Trustees, etc.,
Appellants, v. GEORGE S. COE, Respondent.

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s 147	460
f 147	462
j 147	471

One in possession of land merely, without other actual title, has an estate in the land which he may transfer, and in case he conveys with covenant of warranty running to the grantee, his heirs and assigns, he transfers an estate to which his covenant attaches, and it may be enforced by one succeeding to the grantee's title.

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s 152	461
j 152	468

Certain real estate was conveyed by an assumed owner to the wife of defendant, severally and in her individual right. Defendant joined with his wife in a conveyance of the land, which contained a covenant running to the grantee, "her heirs and assigns," to the effect that the wife was seized of a full estate in the land. Defendant was at the time in possession and surrendered the possession to the grantee, and the grantors jointly received the consideration paid. The grantee executed a mortgage upon the land, and subsequently the owner of the equity of redemption was evicted by the true owners. The mortgage was thereafter foreclosed. In an action upon the covenant, brought by the purchasers upon the foreclosure sale, *held*, that the covenant ran with the land; that upon execution of the mortgage and subsequent conveyance, it went to the mortgagee and the owner of the equity of redemption in proportion to their respective rights; that by the foreclosure and sale the purchasers alone became entitled to sue upon the covenant, and so the action was maintainable.

Mygatt v. Coe (124 N. Y. 212), distinguished.

(Argued March 7, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 17, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

This action was brought to recover damages for alleged breach of covenants of quiet enjoyment and warranty in a deed executed by defendant and his wife.

It appeared that on July 15, 1858, Ebenezer L. Roberts and wife executed and delivered to Almira S. Coe, defendant's wife, a deed, which purported to convey "to her sole and separate use, and with the like effect as if she were unmarried," certain premises, into the occupancy of which

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the grantee then entered and continued until she conveyed the same, on April 12, 1867, to Nancy Fisher, by a deed in which defendant, her husband, joined, and in which, after acknowledging the receipt of the purchase money by the grantor, they jointly made covenants to and with the said grantee, her heirs and assigns, of seizin, right to convey, against incumbrances, of quiet enjoyment, further assurance and warranty, the covenant of seizin being in these words:

“And the said parties of the first part, for themselves and their heirs, executors and administrators, do hereby covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that the said Almira S. Coe, at the time of the sealing and delivering of these presents, is lawfully seized in her own right of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances, free from all incumbrances, and hath good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid.”

In December, 1869, Nancy Fisher mortgaged said premises to the plaintiffs herein as trustees of Sarah M. Mygatt, and in 1871 conveyed the property to one Fuller, who in 1874 conveyed it to one Leavitt. In November, 1878, the true owners of the premises in an action of ejectment evicted Mrs. Leavitt and went into possession. In December, 1878, a suit for the foreclosure of the mortgage to plaintiffs was brought, and on the sale therein the mortgagees became the purchasers, and being unable to obtain possession brought this action. Almira S. Coe died on January 3, 1884, before this action was commenced.

Edward W. Grout for appellants. Defendant had no reason to join in the conveyance, unless to become a grantor, as he did, and to connect himself with the title which in express words he warranted. (*Thompson v. Simpson*, 128 N. Y. 270.) He and his wife jointly made covenants of warranty and quiet enjoyment to the grantee, her heirs and assigns. (Pars. on

Cont. chap. 2, § 1.) But that the defendant's covenants, instead of ending at Mrs. Fisher, or going to her executors or personal representatives, were to go down to subsequent grantees, conclusively appears in that they are made not merely with Mrs. Fisher, but in express words with her heirs and assigns. (*Nye v. Hoyle*, 120 N. Y. 195; *Clement v. Burtis*, 121 id. 708; *Coleman v. Bresnahan*, 54 Hun, 619; *Andrews v. Appel*, 22 id. 429, 432; *Ernst v. Parsons*, 54 How. Pr. 163; *Boyd v. Belmont*, 58 id. 514; *Colby v. Osgood*, 29 Barb. 339; *Preiss v. Le Foidevin*, 19 Abb. [N. C.] 123; *Hart v. Lyon*, 90 N. Y. 663; *Peters v. Bowman*, 98 U. S. 56; *Lawrence v. Fox*, 20 N. Y. 268; *Gifford v. Corrigan*, 117 id. 257, 262, 265; *Van Schaick v. T. A. R. Co.*, 38 id. 346; *Barlow v. Meyers*, 64 id. 41; *Hand v. Kennedy*, 83 id. 149.) There seems to be a conclusive answer to any suggestion that the defendant's covenants of warranty and quiet enjoyment with Mrs. Fisher, her heirs and assigns, did not run down the chain of title to the last grantee, but stopped at Mrs. Fisher to go to her executors or personal assigns—to her general assignee for the benefit of creditors, for instance. If they did not so go down the chain, then after Mrs. Fisher (his grantee) made her conveyance, the defendant could have acquired the true title from the Howell heirs, and in the face of his said covenants with her, and her heirs and assigns of the land, ejected the last grantee. (*Thompson v. Simpson*, 128 N. Y. 270, 286; *House v. McCormack*, 57 id. 310; *Tegft v. Munson*, 63 Barb. 31; *White v. Patten*, 24 Pick. 324; *Trull v. Eastman*, 3 Met. 121-124.) The sense in which we say that the covenants of warranty and quiet enjoyment in conveyances of real property become attached to and run with the land is that they attach to and run with the title which the grantor assumes to convey, by sticking to the land as possession of it is successively delivered, though in fact the grantor is a stranger to the true title. (*Norman v. Wells*, 17 Wend. 136; *Hamilton v. Wilson*, 4 Johns. 72; *Nye v. Hoyle*, 120 N. Y. 195; *Hart v. Lyon*, 90 id. 663.) If the defendant be liable at all, the plaintiffs are

entitled to enforce that liability. (*Rector v. Mack*, 93 N. Y. 488; *Mygatt v. Coe*, 124 id. 212, 240.) The facts now shown of the defendant's possession, his conveying, his receiving the purchase price, his delivering possession, and his covenants of warranty and quiet enjoyment to the heirs and assigns of the grantee, create a privity between the parties upon which the plaintiffs can recover. (*Dexter v. Beard*, 130 N. Y. 549; *Clark v. Devoe*, 124 id. 120; *Beddoe v. Wadsworth*, 21 Wend. 120, 127.) That the defendant was in possession, assumed to convey title, and delivered the possession, is sufficient to make his covenants run with the land, and inure to the benefit of these plaintiffs. (*Slater v. Rawson*, 1 Met. 450; *Wilson v. Widenham*, 51 Maine, 566; *Dickson v. Desire*, 25 Mo. 151; *Field v. Squires*, 1 Dedy, 366-389; *Wead v. Larkin*, 54 Ill. 489; *Slater v. Rawson*, 6 Met. 439.)

W. S. Cogswell for respondent. The judgment appealed from is right and should be affirmed. The subject-matter of this action is *res adjudicata*. (*Mygatt v. Coe*, 124 N. Y. 212; *McCracken v. Flanagan*, 141 id. 174; *Ganley v. T. C. Bank*, 98 id. 487; *Martin v. Rector*, 101 id. 77; *Parker v. Collins*, 127 id. 185; *Kavanagh v. Barber*, 131 id. 211.) If the covenants of the respondent ran with the land and passed to Nancy Fisher's grantees by her conveyance, the appellants never acquired any right to them. (Tiedeman on Real Prop. § 860; Willard on Real Estate, 414.)

FINCH, J. It is our duty to follow and abide by the decision of the Second Division of this court made in the case at bar when it was before them on appeal, so far as the facts found and the questions determined are identical. (*Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465; *Cluff v. Day*, 141 id. 580.) Reserving freedom of thought and action when the case becomes a precedent only, we must here and now, in the same action between the same parties, accept without criticism what has been decided. It is claimed, however,

that upon the last trial new evidence and new findings have totally changed the situation, and introduced questions not previously considered or decided, and that the plaintiffs may now succeed without in the least impugning or contradicting the prior determination. It is to such inquiry that our attention should be principally directed, and it may usefully be preceded by an examination of the points which must be deemed to have been involved in the prior decision.

Our brethren of the Second Division disagreed among themselves, (*Mygatt v. Coe*, 124 N. Y. 212), as was not strange in view of the fact that the question brought to their judgment a judicial quarrel almost as venerable as the common law itself, and open yet to vigorous dispute. (Rawle on Covenants for Title [5th ed.], § 203, note 2.) The majority of the court held; that privity of estate is essential to carry covenants of warranty to subsequent grantees so as to support a right of action by them against the original covenantor whenever evicted by a title paramount to his: that a covenant of warranty made by one having neither title nor possession, and so no estate in the land, will not run with it into the hands of subsequent grantees, but will stop where the privity of contract ends, and so at the first or original covenantee: and that the covenant of Coe, the husband, upon which this action is founded, was that of a stranger to the title, an independent and collateral warrantor, having and transferring no estate in the land, and so in no sense or degree a privy in estate with the subsequent grantees. The point of the decision is emphasized and made clear by the dissent of the minority. They advocated the doctrine that privity of estate is not always essential to carry the covenant down the line of successive grantees, and that one who conveyed nothing but covenanted much, like the prior of the convent who promised perpetual song to the manor chapel, might find his covenant attached to the land and running with it into the hands and for the benefit of successive owners: but while holding and defending this doctrine, Judge BRADLEY, who wrote the dissenting opinion, did not press the point,

or rely upon it as the ground of ultimate decision, but insisted that Coe, the covenantor, was not a stranger to the title because he joined with his wife as a grantor, and assumed to unite with her in transferring to Mrs. Fisher the estate which actually passed. The precise point of disagreement was thus over the attitude and position of the husband in making the conveyance; and the decisive question became whether he did or did not transfer an estate, some estate, to which his covenant could attach, and run with it down the line of transfer. The facts which dictated the conclusion of the majority are carefully stated in the opinion of Judge FOLLETT, who expressed their views. He adverted to the circumstance that the deed from Coe and his wife was not spread upon the record, and might contain something not fully or accurately described in the findings. These, however, showed that the land was conveyed to Mrs. Coe by a deed from an assumed owner running to her severally and in her own individual right; and that, while her husband did join with her in the conveyance to Mrs. Fisher, their covenant of seizin was — not that he was seized or that they were seized — but that she was seized of a full estate in the land. While the joint grant indicated title in the two and some estate in each, as the minority claimed, the form of the joint covenant asserted seizin in the wife alone, which the majority took for the truth. To such last inference the prevailing opinion awarded a predominant force for several expressed reasons. One was that the proof and the findings failed to show any possession in Coe beyond a mere occupancy by the sufferance of his wife, or any transfer of possession by him to Mrs. Fisher. The words of the opinion are these: "The defendant having no estate, title or interest in or possession of the land conveyed, there could be no privity of estate between him and Nancy Fisher." A second reason was that it did not appear that Coe received any part of the consideration paid by the grantee. The language of the opinion in this respect is: "And it was conceded on the argument in this court that it does not appear whether the defendant received the whole or any part of the consideration of the

deed." It is thus obvious that the inference of neither title nor possession in Coe, the husband, drawn from the form of the covenant of seizin, was allowed to prevail because no other fact in the record necessarily contradicted it.

But now three such facts make their appearance in the findings, and force from us a different inference. Referring to the deed from Coe and his wife to Mrs. Fisher, the tenth finding of fact is as follows: "That when the said conveyance was so made and delivered the defendant was in possession of the said real property, consisting of a plot of land with a dwelling house thereon, being there domiciled and residing with his family;" and the eleventh finding is: "That upon the execution and delivery of the said conveyance, the defendant moved out of the said premises, and surrendered the same to the said grantee, who thereupon went into possession of the same." We do not and cannot know upon what proof or upon what facts these findings were based, for none of the evidence given is contained in the record. We are obliged to assume that sufficient and competent proof produced them, and that they are in all respects strictly true. Nor can we narrow or modify them by recurring to the form of the covenant and of the deed running to Mrs. Coe alone. At best these only raised certain presumptions, but presumptions existing from the absence of any contrary facts. Coe's covenant that his wife was seized, justified the presumption that he had no possession, and the maxim that possession follows the deed is expressive only of the presumption which the law raises when there is no proof of the actual facts. (*Frantz v. Ireland*, 66 Barb. 389.) But these presumptions give way before the proven truth. They fall when the facts themselves are shown, and we cannot indulge a presumption that Coe was not in possession in the face of a finding that he was, or that he did not transfer the possession to Mrs. Fisher, when the explicit finding is that he did. I tried for a time in my reflections to think that the learned trial judge may have used the word "possession" in the improper but harmless sense of occupation, but swiftly saw that I had no warrant to change his

words, and that there could be no doubt that he used them carefully, and in their full legal significance; for the circumstances strongly point to that as the truth. The case had been before the Second Division. Both opinions pointed out the vital importance of the inquiry whether Coe had possession or transferred it to Mrs. Fisher, and the action was re-tried and the present findings made in the full light of those opinions. It is not conceivable, under such circumstances, that the learned trial judge carelessly or inaccurately found as a fact that Coe was in possession, or failed to appreciate the full force of the finding. And that is made more obvious by the fact that in the second finding the wife is said to have entered into the "occupancy" of said premises and continued "in such occupancy" until her conveyance. When the learned trial judge, with his attention fully drawn to the significance of his words, has found that the husband was in possession and the wife an occupant merely, by what right shall I or any of us reverse his finding into one that the wife was in possession and the husband only an occupant? We are bound by the finding and must give it the full and lawful force which belongs to it. If on a third trial the fact is found the other way, and should compel a different decision at our hands, it will not be the first time that contradictory findings of fact have enabled ignorance, supposing itself to be wisdom, to charge upon us a seeming inconsistency; but the circumstance will not alter our duty in the least.

A second fact now appears, the absence of which was noted in the prior decision. The answer of the defendant alleges that no consideration was paid to or received by him for "uniting with his wife" in the deed to Mrs. Fisher. But he did not prove that allegation on the trial, for there is no finding of that fact, and not even a request to find it. On the contrary, the deed which he executed is now transcribed in the findings, and it contains the explicit admission that the consideration of eighteen thousand five hundred dollars was "to *them* in hand paid," that is, to the two parties, to the husband and wife both.

At this stage of the case the facts stand thus: That at the date of the conveyance to Mrs. Fisher neither Coe nor his wife had a valid title to the land; that he was in possession and his wife occupied the premises with him; that she had color of title but he not even that; that the two assumed as joint grantors to convey the land to Mrs. Fisher; that Coe delivered the possession to her, which was the only estate which either grantor had or which they could convey, and that Coe shared in the purchase money paid for the grant. On that state of facts I do not see how it is possible to say that Coe was a stranger to the title, or transferred no estate to which his covenant of warranty could attach.

But before pausing upon that proposition I should bring into the discussion the third new fact which makes its appearance for the first time. That is, that in and by the deed, Coe explicitly, and in terms, covenanted not only with Mrs. Fisher, but with her "heirs and assigns." In other words, he meant and intended his covenant to protect not only her, but also those who should come after her by succession to the ownership of the same land. The significance of those words will better appear if we refer back to the early history of these covenants. Originally, the common law did not permit the assignment of things in action, and it followed that a covenant, regarded from the direction of a contract, could not pass beyond the covenantee. But the old warranty seems to have been viewed rather as an incident of, and as belonging to the estate conveyed, and so attached to that estate as to go with it when transmitted. It could not pass to assigns as an independent contract, but by its connection with an estate in land, became transmissible with it. Out of that peculiarity sprang the necessity of privity of estate to enable the subsequent assignee to vouch, or call on his predecessor for protection; but it was an element of the doctrine that neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named. (Rawle, § 203.) As was said, if one "warrant land to a man and his heirs without naming assigns, his assignee shall not vouch." (Co. Litt. 384 b.) That rule

was not applied when the warrantor, instead of substituting other lands, became bound only to respond in damages; but while the necessity has disappeared, the actual use of the words continues to indicate the purpose and intent of the warrantor that his covenant shall not stop with the covenantee, but operate for the benefit of his grantees; and though the use of the words, possibly, may not dispense with some privity of estate, they show that the warrantor regarded himself as making and intending to make a covenant running with the land, and that in holding him to that responsibility we do not put upon him a liability which he did not contemplate. The force belonging to such words is indicated in many recent cases, (*Nye v. Hoyle*, 120 N. Y. 203; *Coleman v. Bresnahan*, 54 Hun, 622; *Hart v. Lyon*, 90 N. Y. 663); and while they are more important and bear more heavily upon the theory that a covenantor having no estate, may by his own special and intended contract, attach his covenant of warranty to the estate of another so as to run with that estate, yet they are entitled to weight and consideration also upon the narrower inquiry whether the defendant here is or is not to be deemed an entire stranger to the title, and they yield an inference which balances somewhat that drawn from the covenant of seizin.

And thus it is apparent that the facts in the present record differ in material and essential respects from those presented on the previous appeal. It is certainly the law of this state that one in possession of land merely, without other actual title, has an estate in the land which he may transfer to a grantee, and which is sufficient to carry with it his covenant of warranty down the line of succession. That was explicitly held in *Beddoe's Ex'r v. Wadsworth* (21 Wend. 124), and I have found no case in this state to the contrary, and no reason to doubt the soundness of the doctrine. We have here then a situation in which the defendant was in possession of land and so had an estate in it; where he assumed to transfer it as grantor by deed; where he transferred his possession to the grantee; where he received in exchange some part or the whole of the consideration of the grant; where his wife, who

joined in the deed, had no better title than his, whatever he may have thought about it; where he meant and intended that his warranty should run to assigns and expressed that intention on the face of his covenant. It is impossible, on such a state of facts, to deem him a stranger to the title and merely an independent covenantor. We must hold that he had and transferred an estate to which his covenant of warranty could and did attach, and in so holding we contravene nothing which was decided on the previous appeal.

Mrs. Fisher, in December of 1869, mortgaged the premises conveyed to her by Coe and wife to the trustees of Sarah M. Mygatt, and in 1871 conveyed the property to Fuller, who in turn conveyed it to Clara B. Leavitt by deed dated in 1874. In November of 1878 the true owners, in an action of ejectment, evicted Mrs. Leavitt and went into possession. In the following December suit was brought on the Mygatt mortgage for a foreclosure, and on the sale in 1879 the mortgagees became purchasers and received the referee's deed. Since the covenants ran with the land, and those of them which were prospective were not broken and turned into mere rights of action until after the delivery of the mortgage to the Mygatt trustees, and the deed of the equity of redemption to Fuller and Mrs. Leavitt, it becomes necessary to determine to whom the covenants ran as between the mortgagees on the one hand and the grantees of the mortgagor on the other. That has been sometimes a difficult and troublesome question, and logically is so yet, although I deem it substantially settled. Under the old system which regarded the mortgage as transferring to the mortgagee the entire legal estate, leaving in the mortgagor only an equity which courts of law could not recognize, it was necessary to say and was said that the covenants running with the land followed the legal estate into the hands of the mortgagee where it remained entire and complete, and the grantees of the equity having no legal estate could have no right to the covenants which already belonged to another. It was so held in *Mayor of Carlisle v. Blamire* (8 East, 487), but the injustice of the doctrine drew upon the ingenuity of equity

to supply a remedy, and where the grantee holding covenants had executed a mortgage, and thereafter having been evicted from the premises by a paramount title, his grantor and covenantor settled with the mortgagee by paying the mortgage in full discharge of the covenants and so assuming to cancel them, the grantee was allowed by a decree in equity to sue the covenantor at law, and the latter was restrained from setting up as a defense in any manner the deed or deeds of mortgage which had diverted the covenants from the main line of succession. (*Thornton v. Court*, 3 De Gex, M. & G. 293.) By this circuitous route the just result was reached of dividing the benefit of the covenants between mortgagee and owner of the equity of redemption according to their respective rights, and the same just distribution is effected under our system by a different process. We regard the mortgagor as retaining the legal estate and the mortgagee as having a lien upon it for his security. The covenants, therefore, run to both mortgagee and grantee of mortgagor in proportion to their respective rights, and the covenant is divisible accordingly. A very clear exposition of this doctrine will be found in *White v. Whitney* (3 Met. 87), and it has been asserted in this state in *Town v. Needham* (3 Paige, 546) and *Andrews v. Wolcott* (16 Barb. 25). By the foreclosure of the mortgage the purchasers at the sale have become alone entitled to sue upon the prospective covenants contained in the deed given by Coe, and on the facts now before us can successfully maintain the action upon the ground that there does exist between them and the covenantor a privity of estate.

Whether, without that, the covenantor would still be bound upon the theory that by his contract he consciously and intentionally attached his covenants to the land of his wife, and privity of estate with the original covenantee alone is sufficient, it is not necessary at present to decide.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

THE CHINA MUTUAL INSURANCE COMPANY et al., Respondents,
v. WILLIAM M. FORCE et al., Appellants.

Where a charter party contains no provision for the payment of freight *pro rata itineris*, but simply provides for payment on delivery of the cargo at the port of discharge, freight is not earned except by performance of the voyage and delivery as specified.

This question is not affected by the "law of the flag" under which the vessel sails. The obligation of the shipper is to be determined by the law of the place where the contract of affreightment was made.

An Italian bark was chartered at New York to carry a cargo from that city to Rangoon, Burmah. By the terms of the charter party the freight was to be paid on delivery of the cargo at the port of discharge. Plaintiffs insured the cargo. Defendants advanced moneys to the master for necessary disbursements, who gave a draft for the amount, pledging the vessel and freight for its payment. This draft was forwarded to Rangoon for collection. The vessel was wrecked, while upon its voyage, on the coast of Burmah, it was abandoned and plaintiffs paid as for a total loss. Part of the cargo and of the ship's stores and furniture was saved, and the salvor filed a petition for salvage in a court of Rangoon of vice admiralty jurisdiction. Defendants' agent also filed a petition in the same court, setting forth the facts and praying for an order of arrest and sale of the ship, cargo, etc. An order of arrest and of sale of the property salvaged was granted, the proceeds to be brought into court, "reserving all questions as to the rights to salvage and of the rights of the parties to the suit." Sale was made and the proceeds deposited in court. Two orders were subsequently made by the court, one in the proceedings first mentioned, decreeing that the salvor was entitled to a sum stated, the other in the second proceeding, decreeing payment of the balance of the proceeds of sale of cargo upon defendants' claim, and payment was so made. In an action to recover of defendants the portion of the proceeds so paid to them, *held*, that while said court had jurisdiction to seize, to order a sale and payment of salvage, its decree summarily disposing of the surplus was not conclusive against plaintiffs, who were not parties to the proceedings and had no opportunity to be heard, that the effect of the sale was simply to discharge all liens on the property and to transfer them to the proceeds; that the power of the court to act summarily against adverse parties, without notice, was limited to the seizure and sale and the award of salvage, and thereafter, although having possession of and jurisdiction over the surplus, it was bound to proceed in some regular way and upon some notice to determine who was entitled thereto, that, subject to the claim for salvage, the proceeds of the sale of vessel and cargo belonged to the owners and could not be disposed of on petition of a claimant,

without notice to them, giving them a day in court; that defendants had no lien upon the proceeds of the sale of the cargo, as the contract of affreightment was not performed and no freight was earned; and that as plaintiffs, by the abandonment and payment as for a total loss, succeeded to all the rights of the owners of the cargo, they were entitled to the surplus so paid over to defendants.

(Argued March 8, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 28, 1892, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs, insurers of the cargo of the bark *Guiseppe Anna*, to recover of defendants a portion of the proceeds of the sale of said cargo, which had been collected by their agent and paid to them.

The Italian bark "Guiseppe Anna" was chartered at the city of New York, in April 1889, through a charter party made between Daniel Bacon, a freight broker of that city, and John C. Seager, agent of the bark, of the same place, to carry a quantity of cases of oil from New York to Rangoon, Burmah, and a bill of lading was issued therefor. The plaintiffs insured the cargo. The defendants advanced moneys to the master for necessary disbursements about the vessel; who gave to them his draft for the amount advanced, and, for its payment, pledged the vessel and freight. This draft was forwarded to the Chartered Bank of India, Australia and China for collection and, by that bank, was sent to its agent at Rangoon. The vessel was wrecked in October, while upon its voyage, by perils of the sea, on the coast of Burmah, near Bassein. There was an abandonment and a payment, as for a total loss, and the plaintiffs, as insurers, succeeded to all the rights of the insured in respect of the cargo and its proceeds. One Anthony Murphy, the master of a steam vessel, had proceeded to the scene of the wreck and had been engaged for several weeks in salvage operations; but had succeeded in only saving part of the cargo and some of the ship's stores and

furniture. On December 16, 1889 he filed a petition for salvage in the Recorder's Court of Rangoon; of vice admiralty jurisdiction. On November 30th, 1889, the Chartered Bank of India etc. had filed its petition in the same court, alleging that it held the draft for the advances to the master and setting forth the wrecking of the vessel, the salvage effected by Murphy and the possession of the receiver of wrecks for the district and praying for an order of arrest and of sale of the ship, cargo etc., and the condemnation of the ship in the amount due the petitioner, subject to the claims of the salvor. Upon that petition the recorder immediately ordered the arrest of vessel, cargo, furniture, etc. On December 10th, 1889, he ordered a sale at public auction of the property salvaged and that the proceeds be brought into court; "reserving all questions as to the rights of the government to be paid salvage and of the rights of the parties to the suit." On December 18th, 1889, the recorder ordered the vessel to be sold by the court's bailiff in January, and the sale to be advertised in certain papers. The advertisement is not shown in the record. Sale was made and the proceeds deposited as a common fund, in the registry of the court. On April 29th, 1889, the recorder made two orders or decrees; one in the proceeding instituted by the salvor, Murphy, against the vessel, by which he decreed him to be entitled to a certain sum by way of salvage; the other in the proceeding of the Chartered Bank of India etc. against the vessel, by which he decreed the payment upon the plaintiffs' claim of the surplus proceeds in the registry of the court, after satisfying the claim of the salvor. This action was brought by the insurers of the cargo to recover of the defendants the portion of the proceeds of the sale of the cargo etc., which had been collected by their agent and paid to them. The theory of the action is that, as no freight had been earned, no lien attached in favor of the defendants through the master's draft, which was enforceable against the proceeds of the admiralty sale, and, hence, they were not entitled to retain the moneys paid to their collecting agent, under the decree of the recorder of Rangoon. The defendants defended the

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Statement of case.

action, upon the ground that the decree of the recorder is conclusive and could not be reviewed here; and they also say that the vessel sailed under the flag of Italy and was owned by a subject of the Italian government and that, therefore, questions relating to reciprocal rights of vessel and cargo, in the absence of some express agreement otherwise, were governed by Italian law; which allows of a lien upon cargo *pro rata itineris*. The evidence upon the trial was wholly documentary; introducing the record of the proceedings had in the Recorder's Court of Rangoon.

The plaintiffs had judgment below in the trial court, which was affirmed by the General Term, and the defendants now appeal to this court.

Harrington Putnam for appellants. The decree of the recorder of Rangoon was rendered by a court of competent jurisdiction, and cannot be impeached collaterally, but is conclusive until set aside or reversed by the same court or some court having appellate jurisdiction. (*Dobson v. Pearce*, 12 N. Y. 156; *Smith v. Nelson*, 62 id. 286; *C. Co. v. Dimock*, 90 id. 33; *Ins. Co. v. Hodgson*, 7 Cranch, 332; *Hendrickson v. Hinckley*, 17 How. Pr. 443, 445.) The decree was rendered by the court proceeding in admiralty and *in rem*, and is, therefore, conclusive with respect to the money in question. (*Gelston v. Hoyt*, 3 Wheat. 246; *O. Ins. Co. v. Francis*, 2 Wend. 64, 68; *Monroe v. Douglas*, 4 Sandf. Ch. 126, 183; *Castrique v. Imrie*, L. R. [4 H. L.] 414; Black on Judg. § 813; *Windsor v. McVeigh*, 93 U. S. 274.) The decree of the court of the recorder of Rangoon was in accordance with the law and justice of the case. (*The Soblomston*, L. R. [1 Ad. & El.] 293; *Lloyd v. Ginbert*, 6 B. & S. 100.) The decree attacked stands entitled to the emphatic statement of the conclusiveness of foreign judgments declared by this court in the cases of *Dunstan v. Higgins* (138 N. Y. 70); *Castrique v. Imrie* (L. R. [4 H. L.] 414).

William W. MacFarland for respondents. In the absence of a contract to the contrary, freight is not payable *pro rata*

itineris. (Carver on Carriage by Sea, § 547; 1 Pars. Mar. Law, 158; Maclachlan on Merchant Shipping, 394; *The Tornado*, 108 U. S. 347; *N. Y. C. & H. R. R. R. Co. v. S. O. Co.*, 87 N. Y. 486; *Hubbel v. G. W. Ins. Co.*, 74 id. 246; *Miston v. Lord*, 1 Blatchf. 355; *Sampayo v. Salter*, 1 Mason, 42; *The Ship National Hooper*, 3 Sumn. 542.) The charter was made in the city of New York for a voyage to Burmah between persons residing in New York. That being the place of the contract it must be construed in respect to rights and obligations according to the law of that place, in the absence of any provision to the contrary. (*Dyke v. E. R. Co.*, 45 N. Y. 113; *Faulkner v. Hart*, 82 id. 413; *L., etc., Co. v. P. Ins. Co.*, 129 U. S. 397.) There was no decree, even in form, as to the ownership of the money remaining in the registry of the court after the payment of salvage. In such cases the question of title to the proceeds (called remnants) arises later on, and has no relation to the sale of the salvaged property, and payment of salvage. A maritime lien upon the balance in the registry existed in favor of the true owners. (*Sheppard v. Taylor*, 5 Pet. 675; *McLane v. U. S.*, 6 id. 404; *M. S. Ins. Co. v. The Brig George*, Olcott, 89; *Brackett v. The Hercules*, Gilpin, 184; Black on Judg. § 183; *Reynolds v. Stockton*, 140 U. S. 265; *Durant v. Abendroth*, 97 N. Y. 133.) The defendants have money in their hands justly belonging to the plaintiffs, which they are entitled to recover. (*Tugman v. N. S. S. Co.*, 76 N. Y. 210.)

GRAY, J. The principal question, which is presented for our consideration, relates to the effect which should be allowed to the decrees of the Vice Admiralty Court in Rangoon. No question is made about its exercise of jurisdiction in seizing and ordering the sale of the vessel, cargo etc.; neither is any question made as to the rights of the salvor to receive salvage moneys out of the fund in the registry of the court. The question is whether, after seizure and sale of the property and the award of salvage moneys, the Admiralty Court could summarily proceed upon the application of the Chartered Bank of

India etc., as it did, with respect to the surplus moneys in its registry. Was its decree as to that matter conclusive upon these plaintiffs and are they debarred from setting up that, however conclusive may have been its decree with respect to the sale of the property, or the award of salvage moneys, they are not concluded from inquiring into the sufficiency of the proceedings to divest them of their proprietary interest in the remainder of the proceeds. After the best consideration I have been able to give to the subject, I think these questions are to be answered in the negative. I am not aware that any rule of the Admiralty Law requires us to answer them otherwise, and although the proceeding was *in rem*, nevertheless, the court was bound to proceed, in the determination of rights to the proceeds, by proper judicial proceedings; without which its decree could not, and ought not to be conclusive. Mr. Justice STORY observed in *Bradstreet v. Neptune Ins. Co.* (3 Sumn. 600), with respect to an essential element for the conclusiveness of a foreign judgment: "That element is that there have been proper judicial proceedings upon which to found the decree;" and he proceeds to describe them, mentioning the necessity of personal or public notice of the proceedings so that the parties in interest may have an opportunity to be heard. Other than what the seizure of the vessel, cargo etc. is deemed to import to the world, there was no notice of any kind to the owner of either and if any publication was made in the whole proceeding, it was under an order directing the bailiff to advertise his sale in certain newspapers. Beyond the petition of the Chartered Bank for the condemnation of the vessel and the order for the payment of the petitioner from the proceeds, subject to the salvor's claim, the foreign record does not disclose any process or proceeding for the determination of the question of its right. Was this record sufficient to show that the court competently exercised its jurisdictional powers, so as to bind parties with adverse interests by its decree? I think not. The proceeding before the admiralty court was against the vessel, cargo etc., and jurisdiction was acquired by their seiz-

ure; which is supposed to constitute due notice to all parties interested and to empower the court to order the disposition of the property seized. It proceeded to order a sale of the vessel, cargo etc., to protect all interests therein, and the effect of the sale was to discharge all liens and to transfer them to the proceeds. The sale passed the title to the property sold as to all the world; although the owners did not appear, and were not heard. The judgment of the court acting *in rem*, by general maritime law, extinguished the title of the owner and is conclusive upon the title, transfer and disposition of the property itself, in whatever place it may be found, and by whomsoever it may be questioned. These principles of admiralty law have been long settled and are too familiar to need the citation of authorities.

There is no dispute here about the competency of the court in Rangoon to act upon the property and to sell it; nor, when the proceeds came into its registry, to direct the payment thereof of the salvor's claim. The difficulty is to see upon what legal principle the court could dispose of the surplus proceeds remaining in the registry, without adjudging as to the title to them, in some manner which would exhibit an observance of essential legal processes. I think that the power of the court to act competently in a summary manner, as against adverse parties without notice, was limited to the seizure and sale of the property and the award of salvage moneys to the salvors. Thereafter, the court, though in possession of and with jurisdiction over the fund, was bound to proceed in some regular way and upon some notice, in order to determine the relative claims of owners and claimants. I am quite unable to see how the mere order to pay the claim out of the surplus moneys is equivalent to an adjudication, which we must regard as conclusive in its nature. After ordering the sale of the property and adjudging upon the salvor's claim, the question of the right of the Chartered Bank to be paid from a fund, which belonged to others, was one *inter alios* and in justice and in reason, as it seems to me, those other parties should have had their day in court. Subject to

the claim for salvage, the proceeds of the sale of the condemned property belonged to the owners of the vessel and cargo; whatever the liens against them. The principle of a jurisdiction in a court of admiralty power to act summarily and conclusively, without actual notice to parties interested in the property, would seem to have been sufficiently satisfied in the proceedings in question, without extending it so as to permit a disposition of these surplus moneys, upon the mere petition of a claimant and without notice of any description. The 43d rule, of the admiralty rules adopted by the United States Supreme Court in 1844, reads that "any person having an interest in any proceeds in the registry of the court shall have a right by petition, or otherwise, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon and to decree therein according to law and justice." These rules represent the general course of admiralty practice, as it came to us from the civil law courts, as modified in English courts, and were intended to be in general harmony with the practice in the maritime courts of other nations. (See Benedict's Adm. §§ 11, 356; Henry's Adm. Pr. § 114.)

The spirit of the rule referred to makes notice necessary to a valid decree, disposing of proceeds remaining in the registry of the court, and the appropriateness of its application is not affected by the fact that the claimant here was already in court by its proceeding against the vessel. This surplus of proceeds, in the registry of the court, belonged, in legal contemplation, to the original owners of vessel and cargo, and were there for distribution only. It was the duty of the court to preserve them for all who had claims upon them; and if it allowed claims to be paid, before the legal right of a claimant was established by due process of law, "it would be nothing else than allowing a man's property to be taken from him without his consent and without judgment of law." (*The Phebe*, 1 Ware's Rep. 360, 365.) It was remarked in *Harper v. The New Brig* (Gilpin's Rep. at p. 546) that "the power

of a court of admiralty over these remnants, or surplusses, is not an arbitrary power, but is governed by principles, which the court is bound to observe before it acts, whether there be or be not a party in court, having an interest or disposition to obtain a proper distribution of them." So far as this foreign record shows, the decree was *ex parte*, upon the petitioner's statement, and seems as little entitled to be regarded as conclusive, as the sentence, commented upon by Mr Justice STORY, in *Bradstreet v. Neptune Ins. Co. (supra)*. Upon authority, as well as upon principle, I think, while the admiralty court retains jurisdiction over the disposition of the proceeds remaining in its registry, after satisfying the purpose for which its jurisdiction was originally called into exercise, which was, I consider, here the sale of the vessel and property saved and payment of the salvors, that jurisdiction is competently exercised only upon due process of law, by which parties having adverse interests are given an opportunity to be heard. In *The Sybil* (4 Wheat. 93), after salvage had been decreed out of proceeds, a claim was interposed by the ship owners for freight and average. Mr. Justice JOHNSON, observing that the court was pretty well satisfied that no freight was earned and that average might have been claimed, said, "in the case then depending, the Circuit Court could not have awarded either of those demands. The question is *inter alios*. There was no pretext for claiming either as against the salvors and the ship owners ought to have pursued their rights by libel, or petition by way of libel, against the portion of the proceeds of the cargo which was adjudged to the shippers. These parties were entitled to be heard upon such a claim and could only be called upon to answer in that mode." In *Andrews v. Wall* (3 How. U. S. at p. 573), Mr. Justice STORY said: "This is a case of proceeds rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the law-

ful ownership thereof. This is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of materialmen, where, after satisfaction thereof, there remain what is technically called 'remnants and surplusses,' in the registry of the admiralty." If these defendants had a maritime lien, which survived the destruction of the vessel, and they had some proprietary interest in the proceeds in the registry of the court, the general rule, as stated by Mr. Benedict, in his work on admiralty, (§ 305) required that "before the proceeds are distributed, the court on proper proceedings for such purpose, should adjudicate upon the claims to such proceeds arising from liens upon them."

In *Sheppard v. Taylor* (5 Peters, 675, 711), it was remarked, with respect to the lien for the wages of seamen upon proceeds, that "it is the familiar practice of the court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds;" who, in that case, were the assignees of the owners.

I think our conclusion must be that the order or decree of the Vice Admiralty Court in Rangoon, directing the payment from the proceeds in its registry of the demand of the Chartered Bank, was not conclusive upon these plaintiffs. There was no actual adjudication upon the question of title, through those proceedings which are recognized to be proper, whether in admiralty, at common law, or in equity. That the decree of a foreign court of admiralty is conclusive, upon the point on which the condemnation of the property rested, is not to be disputed; but that it may decree conclusively upon other points incidental to the distribution of the proceeds, without some proper proceedings giving support to the decree, I am not prepared to admit.

Having reached that conclusion, there remains the question whether the defendants are not, nevertheless, entitled to retain the moneys so awarded to them. They say that they had a legal lien upon the cargo for proportional freight. The charter party provided for the payment of freight upon delivery of

cargo at port of discharge. It is well settled that, unless the contract of parties provides for the payment of freight *pro rata itineris*, it is not earned except by a performance of the voyage and the delivery of the cargo at the place of destination. (*The Tornado*, 108 U. S. 342; *N. Y. C. & H. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486.) I see nothing in this case to warrant us in saying that the facts constituted any exception to that rule. Nor is the question affected by the "law of the flag," as the defendants have argued. The fact that the vessel was Italian does not subject the contract of shipment to the operation of the Italian Commercial Code. The obligation of the shippers of the cargo is to be determined by the law of the place, where the contract of affreightment was made. In the case of the *Liverpool Steam Co. v. Phenix Ins. Co.* (129 U. S. 397), an action brought by an insurance company claiming to be subrogated to the rights of owners of goods on board the "Montana," a British vessel, the question was elaborately discussed, in an opinion by Mr. Justice GRAY, whether, where a contract was made in New York for the shipment upon a British vessel of goods to Great Britain, where the damage itself occurred, questions arising upon the contract should be determined by British law. Many cases in English and American courts were reviewed, including that in this court of *Dyke v. Erie R. Co.* (45 N. Y. 113), and, upon the great preponderance, if not the uniform concurrence of authority, it was held that the nature, obligation and interpretation of the contract are to be governed by the law of the place where it is made. "A contract of affreightment," it was said, "made in a country between citizens, or residents thereof, and the performance of which begins there, is to be governed by the law of that country, unless the parties * * * clearly manifest a mutual intention that it shall be governed by the law of some other country." (And see *Faulkner v. Hart*, 82 N. Y. 413.)

For the reasons expressed, I think the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

SAMUEL P. CLARK, Respondent, v. THE STATE OF NEW YORK,
Appellant. •

142 101
144 416

142 101
157 884

The legislature has power to pass a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract.

142 101
d166 20
j166 27
j166 28

Accordingly *held*, that the act of 1889 (Chap. 380, Laws of 1889), which took effect in June of that year, regulating the wages of day laborers employed by the state or any officer thereof on public works, was constitutional.

142 101
j 78 AD*137
j 78 AD*138

When the compensation of a laborer is so fixed by statute it cannot be reduced by a state officer under whom a laborer is employed, and the fact that he takes for a time a reduced compensation does not estop him from subsequently claiming the residue.

Upon hearing of a claim presented to the Board of Claims the following facts appeared: Plaintiff was employed by the superintendent of public works as lock tender on the canal during the season of navigation of 1889. No express agreement was made for compensation, but claimant was paid twenty dollars monthly; at no time during his employment did he make any claim that he was entitled to more, but he executed no release. *Held*, that the claimant was a laborer within the meaning of said statute of 1890, and that while if there had been a contract, either express or implied, at the beginning of the claimant's employment, fixing his compensation, the act would have had no application, in the absence of such a stipulation he was entitled to recover the difference between the sum fixed by the statute, and that paid to him from and after the time it went into effect.

(Submitted March 8, 1894; decided April 10, 1894.)

APPEAL from award of the Board of Claims, made November 15, 1892, in favor of claimant.

The facts, so far as material, are stated in the opinion.

T. E. Hancock, Attorney-General, for appellant. The statute under which the claimant seeks to maintain his claim contravenes the State Constitution. (Laws of 1889, chap. 380; Const. N. Y. art. 5, § 3; *People ex rel. v. Angle*, 47 Hun, 183; *People ex rel. v. Albertson*, 55 N. Y. 55; Laws of 1889, chap. 309; Laws of 1888, chap. 150; Laws of 1890, chap. 266.)

John O. McMahon for respondent. It is submitted that even though the legislature of 1889 made no appropriations to meet the requirements of chapter 380 of the laws of that year (which fact is unimportant in this case) nevertheless the Constitution of the state, "article 7, section 10," provides that the state may, to meet casual deficits or failures in revenue, or for expenses not provided for, contract debts not to exceed \$1,000,000. (Laws of 1888, chap. 150; Laws of 1889, chap. 309.) The act does not conflict with section 9, article X of the Constitution, since it does not presume to interfere with the salaries of any state officers named in the Constitution, or of any officers whose salaries are fixed by the Constitution. (*Mongan v. City of Brooklyn*, 98 N. Y. 585.) Claimant being employed from four A. M. to eight P. M. cannot be considered a day laborer under chapter 380, Laws of 1889, but clearly comes under the class of "those employed otherwise," whose compensation the statute expressly fixes by the hour, at not less than twenty-five cents. (*Kehn v. State of N. Y.*, 93 N. Y. 291; *Satterlee v. Board of Police*, 75 id. 38; *People ex rel. Ryan v. French*, 91 id. 265; *Riley v. Mayor*, 96 id. 339; *Post v. U. S.*, 148 U. S. 124; 108 N. Y. 475.) The award should draw interest. (11 Wend. 478; 36 N. Y. 255; 49 id. 304; 45 id. 306; 62 id. 316; 50 Barb. 62.)

O'BRIEN, J. The Board of Claims have made an award in this case in favor of the claimant based upon the following facts: The claimant was employed by the superintendent of public works during the season of navigation from May 1 to November 1 in the year 1889, as a locktender on the canal. No express agreement was made as to compensation, but payment was made monthly during the six months of his employment at the rate of \$20 per month. This seems to have been the compensation theretofore paid to persons so employed. The claimant, during part of the time at least, signed the monthly pay rolls, and at no time during his employment did he make any claim that he was entitled to more. No question as to the liability of the state to pay the claimant any more

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could possibly arise upon these facts, except for the enactment by the legislature of chapter 380 of the Laws of 1889, which took effect on the 6th of June of that year. Although this statute was repealed by the succeeding legislature (Laws of 1890, ch. 218), it was in force during nearly five months of the period of the employment. As the award rests entirely upon this statute, it may be well to give it here in the language used by the legislature :

"An act to regulate the rate of wages on all public works in this state, and to define what laborers shall be employed thereon.

"Section 1. From and after the passage of this act wages of day laborers employed by the state, or any officer thereof, shall not be less than two dollars per day, *and for all such employed otherwise than day laborers* at a rate of not less than twenty-five cents per hour.

"Sec. 2. In all cases where laborers are employed on any public work in this state, preference shall be given to citizens of the state of New York.

"Sec. 3. This act shall take effect immediately."

I am unable to see why the claimant was not a laborer upon the public works of the state employed as such by an officer of the state within the meaning of this statute. If the claimant was entitled to its benefits he is not concluded by the fact that he received pay from time to time at former rates and signed the pay rolls. He has not released the state from any of its legal obligations to him. The superintendent, who is charged with the duty and vested with the power under the Constitution of employing all persons necessary in the care and management of the canals, might, notwithstanding this statute, have made contracts for labor and services before it was passed upon such terms and at such rates of compensation as in his judgment was most advantageous to the state, but the finding in this case implies that no such contract was made. The trial court might have found from all the facts and circumstances that the claimant agreed to perform the services for \$20 per month and that compensation at that rate was

what the parties intended, but the evidence was of such a character as to render another view possible. At all events under the circumstances of this case we feel concluded by the finding. The statute did not take effect until after the claimant was employed, and if he entered the service under a contract, express or implied, it could not be affected by subsequent legislation. The contract need not be expressed in formal words or in writing, but could be implied from the situation and conduct of the parties and from the circumstances.

There is no exception to the findings as made and there was no request to find a contract from the facts disclosed. We must, therefore, treat the case as one of employment merely without any contract as to compensation, and this brings us to the question discussed by the learned attorney-general in regard to the power of the legislature to enact the statute in question. By section three of article five of the Constitution, certain powers are conferred and duties imposed upon the superintendent of public works with respect to the care and management of the canals that may not be affected by legislation. (*People ex rel. Killeen v. Angle*, 109 N. Y. 564.) But in the exercise of these powers and in the performance of these duties he is not wholly independent of the legislature. The law-making power has the sole authority over the subject of taxation and the appropriation of money. The funds necessary to enable the superintendent to perform the duty of maintaining and managing the canals must be appropriated and are subject to legislative discretion. It may appropriate more or less, or not at all, according to its own views of necessity and its own judgment as to what course will best subserve the public interests. It may direct how and in what particular manner the money devoted to canal maintenance may be expended, and, incidentally, it may fix the rate of compensation to be paid for services performed upon the canal when no contract right is thereby impaired. It is said that to concede this power to the legislature would enable it to paralyze the powers conferred by the Constitution upon the superintendent, since it might, by means of extravagant com-

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pensation to employees, waste the moneys devoted to the care and management of the canals. That may be true in the sense that all powers, legislative or otherwise, are liable to be abused. So it might refuse to appropriate at all, and the superintendent would be without any means whatever to enable him to perform his duties. But these extreme cases which show that power may possibly be abused, are no proof that it does not exist. The court cannot construe the Constitution so as to preclude all possibility of the abuse of power. There has always been ample room within the pale of the Constitution for the misuse or abuse of powers conferred upon public bodies or officers, which is subject in a large measure to the exercise of discretion. It must be assumed that the legislature and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the Constitution or the law fairly and in the public interests. There is no express or implied restriction to be found in the Constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state. That legislation is doubtless open to criticism from the standpoint of sound policy and expediency, but the courts have nothing to do with these questions so long as it is not in conflict with the Constitution, and we think that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy. That the law was neither wise nor practicable may be inferred from the fact that it was promptly repealed at the very next session, and we have to deal only with such rights as the claimant upon the record acquired under it. Where the compensation of an employee of the state is fixed by statute, it cannot be reduced by the state officer under whom he is employed, and the fact that the employee takes for a time the reduced compensation, does not estop him from subsequently

claiming the residue. (*Kehn v. State*, 93 N. Y. 291; *Riley v. Mayor, etc.*, 96 id. 331.)

It is true that when the claimant was employed there was no statute regulating his compensation, and it was competent for the officers in charge of the canals to stipulate with him upon any measure of compensation that might be agreed upon by the parties, and the statute would have no application to this case during the period when the contract was in force. So that in this case a finding that the claimant entered into the service of the state in pursuance of a contract, express or implied, under which he was to render the service for the compensation paid, would defeat the claim, but, in the absence of such finding, we must dispose of the case upon the assumption that there was no such stipulation. This court will not look into the evidence for the purpose of making a finding to reverse a judgment, though it may do so for the purpose of sustaining it.

For these reasons, the award of the Board of Claims should be affirmed, with costs.

All concur.

Award affirmed.

JERRY McCUE, Respondent, v. THE NATIONAL STARCH MANUFACTURING COMPANY, Appellant.

Where a master does not require his servant to repair machinery used by the latter, when out of order, but has a machinist employed to perform that duty, to whom the servant is required to report in case the machinery becomes out of order, it is not required of the master to instruct the servant as to the manner of repairing or the danger of attempting it, and in case the servant does attempt it without orders and is injured, the master is not liable.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor

of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal injuries received by plaintiff while in the defendant's employ.

The facts, so far as material, are stated in the opinion.

E. Countryman for appellant. The court erred in refusing to non-suit the plaintiff. There is no view of the evidence on which a recovery can properly be sustained. (*Cahill v. Hilton*, 106 N. Y. 512; *Crown v. Orr*, 140 id. 153, 450, 451; *Stringham v. Hilton*, 111 id. 188, 195, 196; *Burke v. Witherbe*, 98 id. 562, 565, 566, 567; *Hickey v. Taaffe*, 105 id. 26, 36; *Kaye Case*, 51 Hun, 520, 522; *Thorne Case*, 11 N. Y. S. R. 845; *Smith v. Martin*, 39 id. 126; *Buckley Case*, 113 N. Y. 540, 545; *Ogley v. Mills*, 139 id. 458.) The non-suit should also have been granted on the ground that there was no proof of the absence of contributory negligence. On the contrary, such negligence was proven affirmatively. (*Cahill v. Hilton*, 106 N. Y. 512; *Crown v. Orr*, 140 id. 451.)

Benjamin W. Downing for respondent. The principle of law is well defined that a duty devolves upon a master before putting a common laborer in charge of dangerous machinery, with which he is not acquainted, to instruct and qualify him for such duty, and failing so to do, the master is guilty of negligence. (*Brennan v. Gordon*, 118 N. Y. 489, 494; *Crown v. Orr*, 140 id. 450-453.) The negligence of the foreman to properly instruct the plaintiff in the danger of his attempting to fix the machinery was negligence on the part of the defendant master. (*Mann v. D. & H. C. Co.*, 91 N. Y. 495-500; *Loughton v. State*, 105 id. 159, 162, 163; *Brennan v. Gordon*, 118 id. 489-494.) In the absence of express instruction from defendant of the danger of fixing the machinery, and in view of the special instruction to him to "fix the machinery when out of gear," it was not negligence on the part of plaintiff to attempt to fix the key in the wheel. (*Connolly v. Poillon*, 41 N. Y. 619.) The co-operation of the negligence of the

defendant and of the foreman in the production of the injury by failing to warn the plaintiff of the danger in fixing the machinery does not excuse the defendant from liability therefor. (*Stringham v. Stewart*, 100 N. Y. 516-526; *Fuller v. Jewett*, 80 id. 46, 52; *Cone v. D., L. & W. R. R. Co.*, 81 id. 209; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546.) The denials of the motions for non-suit and to direct a verdict for defendant were proper. (*Thurber v. H. B., M. & F. R. R. Co.*, 60 N. Y. 326.) This court cannot interfere because of the amount of damages. (*Kiff v. Youmans*, 86 N. Y. 324-327.)

O'BRIEN, J. The plaintiff, while in the employment of the defendant, in the month of August, 1891, sustained a very serious injury to his right arm and hand for which he recovered the judgment appealed from. There is little if any dispute as to the facts, and none whatever as to the manner in which the accident occurred. The defendant's business was manufacturing corn starch. The plaintiff had been employed in the factory as a day laborer for about three years prior to the injury in the feed department. In the room where the plaintiff was so employed there are a number of cisterns standing upon the floor in double rows, each cistern being six feet high and about sixteen feet in diameter, and each row of cisterns being separated from the other by a trough or gutter connecting with the cisterns on either side; and this gutter is covered with planks, forming a platform about two feet high from the floor, upon which the workmen stand to pass to and fro in the discharge of their duties. There are several plug holes on the side of each cistern, which are used to draw off the water, and another one in the bottom operated by a crank at the top to let out the feed; and also one or two steps on the outside to enable the workmen to ascend high enough to remove and replace the plugs, as well as move the lever which sets the stirrer in motion. Over each row of cisterns there is a line of shafting supported by a framework of beams about two feet below the ceiling. This shafting pierces the vertical

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cog wheel located over each cistern, which is fastened to the main shaft by means of a key or pin placed in a groove, and this cog wheel may be brought into connection with a similar horizontal wheel attached to the upper end or top of the stirrer, which, when in operation, turns the stirrer used to stir up the feed in the cistern and to assist in expelling it therefrom through the plug holes. These cog wheels may, by means of a lever, be readily thrown in or out of gear for the purpose of starting or stopping the stirrer, and the whole line of shafting over the entire row of cisterns may also be disconnected from the power by which the machinery is run, by means of a clutch provided for that purpose.

The plaintiff's duties as a workman consisted in managing these plugs, by removing and replacing them from time to time, and operating the lever over the cisterns or vats which placed the horizontal cog wheel in or out of gear with the vertical wheel. This lever could be moved by standing on the upper step outside of the cistern. Sometimes the driving chain or belt which passes over the main power wheel in another part of the building, and connects it with the other machinery, would come off, thus stopping the machinery. The plaintiff and other employees sometimes assisted in replacing this chain when the machinery was not in motion. With this exception the plaintiff's connection with the care of the machinery or its use or management, seems to have been confined to moving the lever which placed the stirrer and the vertical wheel in and out of gear.

On the 31st day of August, 1891, while the machinery was in motion and the plaintiff was performing his usual duties, the pin or key which locked one of the vertical cog wheels over a cistern to the main shaft, dropped out, thus loosening the wheel so that it did not move with the shaft and did not turn the wheel operating the stirrer, as it should have done. The plaintiff undertook to replace the key, and thus re-lock the wheel to the shaft, with a spike, and with this view, crawled up and over the framework which supported the shaft and wheel, and while the shaft was in motion inserted the spike

with one hand while clinging with the other hand to the beam on which he lay. Having with some difficulty inserted the spike, the main cog wheel immediately moved with the shaft and caught his right arm, causing the injury.

There was a machine shop in the building fifty or seventy-five feet distant from where the plaintiff was, in which the defendant kept several machinists employed, whose duty it was to oil and keep the machinery in order. The plaintiff testified in substance that when employed he was directed to adjust the machinery when out of gear, and that it was part of his duties to fix his own machinery. This doubtless referred to his duty to throw the horizontal wheel out of gear when necessary to stop the stirrer, and no injury resulted from that operation. The injury resulted from an attempt by the plaintiff to lock the vertical wheel to the main shaft. The testimony on the part of the defendant, from several witnesses, was to the effect that the plaintiff was not required to repair or adjust machinery when out of order; that he had nothing to do with it but report the fact to the office of the machinist in the same building, whose duty it was to put it in order or make the necessary repairs. The complaint contained no distinct general allegation of negligence on the part of the defendant, but it did contain a specific charge of neglect in not furnishing the plaintiff with a safe place to work and suitable and safe machinery to operate. At the close of the evidence the court ruled that there was no case of negligence in omitting to furnish a safe place to work or in omitting to furnish safe, proper and adequate machinery shown, and refused to submit any such question to the jury, but did submit the case to the jury upon another theory which was not suggested in the complaint. The learned judge charged the jury that the plaintiff's case must rest upon the omission by the defendant to warn the plaintiff, who was a laborer not skilled in the use of machinery, of the danger incident to its use and the neglect to instruct him as to its use and as to the manner of adjusting it when out of order. The recovery was, therefore, had upon a ground not disclosed

by the complaint. But as no specific objection was made upon this ground, it becomes necessary to examine the case upon the theory under which it was sent to the jury. As the defendant did not require day laborers to repair machinery out of order, but had a machinist in the factory to perform that duty, it was not necessary to instruct them as to the manner of repairing or adjusting it when out of order. The master had no reason to anticipate that when the wheel became unlocked from the shaft the plaintiff, while the machinery was in motion, would attempt to lock it. The sole cause of the accident was the attempt of the plaintiff to do that while the shaft was revolving. His duty did not require him to run such a risk. He received no order or direction from any one to attempt an operation involving so much danger. It was a voluntary act on his part not at all necessary to the performance of the work which he was employed to do. When he discovered that the vertical wheel was loose upon the shaft and undertook to fasten it, without stopping the machinery, he took upon himself the risks and dangers of the operation. He thereby exposed himself to injury without cause, as common prudence required that he should report the fact to the machinist, who was in the same building, and who was charged by the master with the duty of doing what the plaintiff thus unnecessarily attempted to do. The operation which the plaintiff attempted to perform was not dangerous in itself, and was rendered so only by the fact that the machinery was not stopped while the pin which fastened the wheel to the shaft was being adjusted. The plaintiff alone was responsible for the result, as he was engaged in an act the danger of which was obvious, and which was outside of the duties which the master required him to perform. (*Crown v. Orr*, 140 N. Y. 450; *Cahill v. Hilton*, 106 id. 512.) The evidence did not establish any personal neglect or fault on the part of the master. He was not required to give instructions as to the necessity in such cases, or the manner of stopping the movement of the shaft, as he could not reasonably anticipate that the plaintiff would

attempt to do what he did. Moreover, the plaintiff had three years' experience in the performance of his duties. The machinery, so far as he had anything to do with it, was of the simplest kind. Whatever dangers were involved in the act which he attempted to perform were obvious, and as well known to him as to the master. He could not voluntarily do an act which he was not required to do and charge the master with responsibility for the resulting injury. The accident was not caused by the plaintiff's ignorance of the machinery. He had seen its operation for three years. He knew what was out of order and how to correct the difficulty, and his only mistake was in assuming that he could safely adjust the wheel to the shaft without cutting off the power. The plaintiff was injured, not because he was ignorant or needed instructions, but because he was not cautious, a fault which more frequently proceeds from confidence and familiarity with the use of machinery than from ignorance. The master is always at fault when such an injury results from unsuitable or defective machinery which he could have repaired or replaced by the exercise of reasonable care, but that question was not submitted to the jury. The verdict is based upon the principle that the master failed to perform his duty to the plaintiff in not warning him against the possibility of such an accident or instructing him how to avoid it. This imposed upon the defendant a measure of responsibility not warranted by the rules of law. The judgment must, therefore, be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

THE PEOPLE ex rel. JOHN J. GRIFFIN, Appellant, v. AUSTIN
LATHROP et al., Respondents.

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148	161
142	118
158	617

The provisions of the act of 1884 (Chap. 312, Laws of 1884), as amended in 1887 (Chap. 464, Laws of 1887), giving to honorably discharged Union soldiers and sailors a preference for appointment and employment in all public departments, and imposing upon all public officers having the power of appointment the duty of a faithful compliance with the act, does not abrogate or repeal the power to discharge which existed prior to its passage.

In the absence of restraints imposed by the Constitution or by statute, the power of appointment to office implies the power of removal when no definite term is attached to the office by law.

Accordingly *held*, that the power given by the Constitution to the agent and warden of a state prison to appoint certain officers thereof, including keepers, gave to the warden the power of removal, and, assuming that the power is subject to legislative regulation, it was not abrogated by said act in the case of an honorably discharged soldier who had been appointed a keeper in a state prison.

Also, *held*, that even if the discretion of the appointing power was limited as to removals by said act, these restrictions were removed by the act of 1889 (Chap. 382, Laws of 1889), which confers power on the agent and warden to appoint and remove keepers.

Reported below, 71 Hun, 202.

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from an order of the General Term of the Supreme Court in the second judicial department, made May 8, 1893, which affirmed an order of Special Term denying an application for a peremptory writ of mandamus to compel the reinstatement of the relator as keeper of Sing Sing state prison.

The facts, so far as material, are stated in the opinion.

Horace D. Ellsworth for appellant. Mandamus is the proper remedy to restore to relator his rights — to reinstate him. (*People v. M. Society*, 24 Barb. 570; *People v. M. P. Board*, 30 id. 527; *Adriance v. Suprs.*, 12 How. 224; *People v. Scrugam*, 20 Barb. 302.) Mandamus is the only remedy relator has. (*Sullivan v. Gilroy*, 8 N. Y. Supp. 401; Laws

of 1887, chap. 464.) The act of 1887 (Chap. 464) confirmed the relator's right to his position and employment as a keeper in the prison. (*People ex rel. v. French*, 5 N. Y. Supp. 712.) The act of 1887 (Chap. 464) is in harmony with the section of the Constitution creating the office of superintendent of state prisons. (Laws of 1873, p. 1406; *Killeen v. Angle*, 109 N. Y. 564.) The legislature has power to limit, regulate and control as to appointments by inspectors, superintendents, wardens and keepers of the state prisons. (Laws of 1874, chap. 451; *People ex rel. v. Comstock*, 78 N. Y. 360; *People ex rel. v. Dayton*, 55 id. 367, 378.) The legislature has assumed and exercised the right to legislate granted by the amendment. (Laws of 1877, chap. 464; Laws of 1889, chap. 382.) The act of 1887 (Chap. 464), the soldiers' act, is in harmony with the act of 1889 (Chap. 382), relating to and regulating the control of the prisons. (*In re Townsend*, 39 N. Y. 174; *Killeen v. Angle*, 109 id. 564; *People ex rel. v. Potter*, 47 id. 375; *People v. Draper*, 15 id. 532; *People v. Gilson*, 109 id. 397; *Board of Excise v. Barry*, 34 id. 666; *People ex rel. v. Durston*, 119 id. 577; *In re N. Y. E. R. R. Co.*, 70 id. 342; *People ex rel. v. Comstock*, 78 id. 356; *Kerrigan v. Force*, 68 id. 385.) The legislature has recognized the limitations upon its power in regard to appointments by the superintendent of public works, as distinguished from its power in regard to appointments by the superintendent of state prisons. (*People ex rel. v. Lathrop*, 71 Hun, 202.)

T. E. Hancock, Attorney-General, for respondent. The legislature was powerless to regulate the appointment or removal of officers in the prisons of the state. (Const. N. Y. art. 5, § 4; Id. art. 10, § 3; *People ex rel. v. Angle*, 109 N. Y. 564; *Menges v. City of Albany*, 56 id. 374; *Barker v. People*, 3 Cow. 686; *People ex rel. v. Keeler*, 29 Hun, 175; *People ex rel. v. Durston*, 3 N. Y. Supp. 522; *Simis v. Fire Comrs.*, 73 N. Y. 437; *Weidman v. Bd. of Education*, 26 N. Y. S. R. 765; Civil Service rule 45.)

O'BRIEN, J. The relator, an honorably discharged soldier, had served for many years as a keeper in the state prison at Sing Sing, from which position he was discharged by the agent and warden in September, 1891, without any charges being made against him or any fault on his part in regard to the performance of the duties of the place. Another honorably discharged soldier was appointed in his place. The relator applied to the court for a peremptory writ of mandamus to compel his reinstatement, which was denied, after a hearing, and the order has been sustained by the General Term.

The sole question presented by the appeal is one of power. If the agent and warden had the legal authority to discharge the relator and appoint another person in his place the court cannot control the use of this power nor interfere with the exercise of discretion or advise the officer touching the performance of his duties. The discharge of the relator might not be regarded, under all the circumstances, as just or wise, but the courts have nothing to do with these questions. We have the right to look into the question of power, but the writ demanded by the relator could not issue except to require the superintendent or warden to perform some act which the relator could demand as a legal right. The contention in behalf of the relator is, that he was illegally discharged, and that he is entitled to be reinstated in the position from which he was removed and this by force of the terms of the statute. (Laws of 1887, ch. 464.) By that act the legislature has declared that "In every public department and upon all public works of the state of New York, and of the cities, towns and villages thereof, and also in non-competitive examinations under the Civil Service Laws, rules or regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment; age, loss of limb or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties involved."

The second section provided that "all officials or other per-

sons having power of appointment to, or employment, in the public service, as set forth in the first section of this act, are charged with the faithful compliance with its terms, both in letter and spirit, and a failure therein shall be deemed a misdemeanor."

It will be seen that though this statute prescribes the duty of officers possessing the power of appointment, it contains no language that abrogates or repeals the power to discharge which existed before its first enactment in 1884. By section 4, article 5 of the Constitution the appointment of certain officers in the prisons, including guards or keepers, is vested in the agent and warden. The language of the section is such as to justify the inference that this power was subject to legislative regulation. Assuming that it is, the question arises whether the legislature has, in fact, made any regulation abrogating or in any way restricting the power of the agent and warden to remove his appointees at his discretion. In the absence of restraints imposed by the Constitution or by statute the power of appointment implies the power of removal when no definite term is attached to the office by law. (*People ex rel. Cline v. Robb et al.*, 126 N. Y. 180.)

It is quite clear, therefore, that prior to the enactment of the statute, upon which the relator relies, he could have been discharged at the discretion of the warden. The statute has not abrogated this power. In fact it is silent on the subject of the power to discharge and only imposes a duty upon the appointing officer when making appointments to prefer honorably discharged soldiers. But even that duty is not imposed by the statute in absolute or unqualified terms, but it is left to the judgment and discretion of the appointing power to determine in each case whether or not the soldier claiming the preference possesses the business capacity necessary to discharge the duties of the place. If the officer authorized to make an appointment refuses to perform the duty imposed by this statute, or acts in bad faith, or abuses the discretion reposed in him, he may be subject to indictment or impeachment, or both, but the power of removal is not abrogated or

restricted. The duty of the warden in making appointments of guards and keepers in the prisons is of the most important and delicate nature. The appointees should be capable of forming a correct judgment in regard to the conduct of prisoners, able to discern their motives and purposes and to meet an emergency when necessary. They should possess the necessary qualities of temper, courage and loyalty. No statute can be drawn so as to describe an ideal appointment to a place the duties of which involve the care and control of convicts in the prisons of the state. The selection in the end must be left to the discretion and judgment of some one, and this the statute fully recognizes. To compel the superintendent or warden, charged with the management of the prisons and responsible for the manner in which the duty is discharged, to reinstate, against his judgment, a discharged keeper or guard would introduce into prison management a most mischievous principle. It might and probably would produce great demoralization and tend to the destruction of all order and discipline. It would have much the same effect upon prison discipline, though perhaps in a less degree, that it would have upon military discipline if appointments and removals in the army were to be regulated by the writ of mandamus.

The case has thus far been considered without reference to another statute. (Laws of 1889, ch. 382.) This statute in express terms confers power upon the agent and warden to appoint the keepers and to remove them. It expressly applies to the prisons and was enacted subsequent to the statute giving preference in certain cases to soldiers, and subsequent to the Civil Service Laws. It leaves the appointment and removal of keepers and guards in the prisons to the judgment and discretion of the agent and warden, subject to the approval of the superintendent. It enacts the same policy outlined in the Constitution itself, and which the legislature did not intend to disturb by the so-called Soldier Law of 1887. But even if this were otherwise and it could be maintained that the discretion of the appointing power is restricted by the former act, then these restrictions must be deemed to be removed

by the later statute which alone contains the rule upon which appointments and removals in the prisons must be regulated. So the discharge of the relator was within the power and discretion of the agent and warden. It is within the same discretion to reinstate him or not, and hence the writ of mandamus was properly refused.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

PETER FOLMSBEE, Respondent, v. THE CITY OF AMSTERDAM,
Appellant.

Although, in the absence of a statute providing for compensation, an abutting owner, whose land is injured by the change of grade of a street lawfully made, is without remedy, where the title of such owner extends to the center of the street, if the municipality illegally and wrongfully excavates or otherwise interferes with the street, it is liable to him for the damages.

When it is necessary in order to effectuate the plain purposes of a statute, the word "or" may be changed to "and" or "nor."

Under the charter of the city of Amsterdam (§ 95, chap. 131, Laws of 1885), before the grade of a street which has once been established can be changed, there must be a "petition of the owners of a majority of the lineal feet fronting on the part of the street to be graded," and compensation must also be made to the owners of the property injured by the re-grading.

To establish the grade of a street within the meaning of said charter, it is not essential that there should be a formal ordinance; it may be established by long user and by the acquiescence and recognition of the municipality.

In an action brought by plaintiff to recover damages to his lots bounded on S. street in said city, caused by changing its grade, and also to vacate an assessment upon said lots for sidewalks constructed in front thereof on said street and K. street, these facts appeared: S. street had been used as a public street for more than forty years; it was graded and improved by the municipality and houses were built compactly on both sides, conforming to the grade of the street as it then existed. Sidewalks had been built under direction of the municipal authorities upon grades given by them. Defendant's common council passed a resolution establishing a new grade for S. street. There was no petition of owners requesting the change. To conform to the change of grade, S. street was excavated in front of plaintiff's premises and a new sidewalk

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laid. *Held*, that plaintiff was entitled to recover his damages; and that the assessment for laying the sidewalk was void.

Also *held*, that the assessment was void, as it included the expense of a sidewalk on K. street, which the common council had not by ordinance ordered to be constructed, and which plaintiff had not by any notice been required to construct as required by the charter.

Reported below, 66 Hun, 214.

(Argued March 8, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages to certain lots belonging to plaintiff on Spring street, in the city, formerly the village, of Amsterdam, alleged to have been caused by changing the grade of the street, and also to vacate an assessment upon said lots for sidewalks constructed in front of them on Spring and Kimball streets.

The premises in question were situated on the corner of Spring and Kimball streets, and were purchased by plaintiff in 1872, his title extending to the center of the highway. Since 1850 Spring street had been graded and used by the public, and work done thereon by the village authorities, and sidewalks built on each side of it, the grade and location thereof being fixed and adjusted by the village trustees. More than twenty years ago Kimball street was opened and laid out as a street connecting with Spring street. In August, 1887, plaintiff was notified by the defendant that he was required to build sidewalks, curbs and gutters in front of his premises on Spring street, within sixty days from the date of said notice, the sidewalks, curbs and gutters to conform to the grade established by ordinance of defendant's common council October 5, 1886. In December, 1887, defendant excavated on Spring street, cutting it down several feet in front of plaintiff's lots, and re-laid the sidewalks at the new grade. This was done without any petition or consent on the part of the abutting owners, and without payment of damages.

The assessment for laying sidewalks in front of plaintiff's lots included the expense of the sidewalk on Kimball street, which the common council had not by ordinance ordered to be constructed, and which plaintiff had not been notified to construct, as required by said charter (§ 98).

Further facts are stated in the opinion.

Edward J. Maxwell for appellant. By section 95 of the charter the common council of said city were given full power to grade Spring street. It was not a change of grade, but an original grading. There is no inhibition on any such work until "the grade of the street has been established and the street graded accordingly." (*O'Reilly v. City of Kingston*, 114 N. Y. 445; *Whitmore v. Village of Tarrytown*, 51 N. Y. S. R. 69.) The rule is well settled that an abutting owner cannot recover damages for street grading in a city without a special provision in the charter. (*Rudcliff v. Mayor, etc.*, 4 N. Y. 195; *Selden v. D. & H. C. Co.*, 39 id. 642; *Coster v. Mayor, etc.*, 43 id. 415; *Brooklyn v. Armstrong*, 45 id. 245; *People v. Belerick*, 20 Barb. 231; *Ely v. City of Rochester*, 26 id. 137; *Swett v. City of Troy*, 12 Abb. Pr. [N. S.] 103; *Comrs. of Kensington v. Wood*, 49 Am. Dec. 582.) With respect to the portion of the judgment restraining defendant from enforcing the assessment for sidewalks in front of plaintiff's premises, the claim is made that plaintiff was given no notice. No direct notice was required. Constructive notice was given, and was also provided for by the charter. (*In re City of Amsterdam*, 36 N. Y. S. R. 950; *Williams v. Dunkirk*, 3 Lans. 44; *Haskell v. Village*, 5 id. 43; *Vill. of Fulton v. Tucker*, 5 T. & C. 624; *People v. Mayor, etc.*, 4 N. Y. 419; *Muncy v. I. Co.*, 18 How. [U. S.] 272.) The power of taxation ought not to be interfered with by injunction except under very special circumstances. (*Stevens v. N. Y. & O. R. R. Co.*, 13 Blatchf. 104; *R. W. R. R. Co. v. Smith*, 101 N. Y. 684.) The plaintiffs have mistaken their remedy if they had any. They have no remedy by action in any event. (2 Dillon on Mun. Corp. [4th ed.]

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814; *Watson v. City of Kingston*, 114 N. Y. 88; *Radeliff v. Mayor, etc.*, 4 id. 203; *Conkling v. N. Y., O. & W. R. R. Co.*, 102 id. 107; *Lynch v. Mayor, etc.*, 76 id. 60; *Wilson v. Mayor, etc.*, 1 Den. 595; *Heiser v. Mayor, etc.*, 104 N. Y. 68; *Bartlett v. Village of Tarrytown*, 30 id. 341.)

W. B. Dunlap for respondent. The provision of the charter prohibiting a change of grade without the consent of property owners being in derogation of the rights of property and providing a remedy for the taking of property should be so construed as to effect the purpose which it was intended to accomplish. Unless the statute plainly and clearly takes away the right of the citizen it should not be construed to deprive him of a remedy that had theretofore existed. (*W. Cemetery v. R. R. Co.*, 4 Abb. [N. C.] 15, 19; Laws of 1883, chap. 113; *Wood v. Lacombe*, 99 N. Y. 43; *O'Reilly v. City of Kingston*, 114 id. 445; *L. S. R. R. Co. v. Roach*, 80 id. 344.) The defendant, or its common council, were bound to follow all the requirements of the statute in order to acquire jurisdiction of the subject-matter. (71 N. Y. 309; 15 id. 516; 66 id. 395; 42 How. Pr. 115; 123 N. Y. 31; 6 id. 92; 73 id. 73; 139 id. 481.) That which the legislature has directed, the courts cannot declare immaterial. (71 N. Y. 309; 123 id. 31; 139 id. 481.) The work was done without a petition and without making any compensation. It is clearly right and the obvious intention that the petition or compensation shall precede the establishing of the new grade and regrading. (*O'Reilly v. City of Kingston*, 114 N. Y. 439; *Bell v. Mayor, etc.*, 105 id. 139; *Delafield v. Brady*, 108 id. 524; *Wood v. Lacombe*, 99 id. 43; *Bartlett v. Vil. of Tarrytown*, 55 Hun, 492.) The respondent has pursued the proper remedy. (*Seifert v. City of Brooklyn*, 101 N. Y. 136; *Dillon on Mun. Corp.* §§ 990-994.) The appellant having answered on the merits, tried the action without objection as to its being the proper remedy, and never having raised the question except by a supplemental brief at the General Term is now estopped from objecting that this action is not the

proper remedy. The objection should have been taken at the first opportunity. (*Stearns v. L., N. Y. & P. S. S. Co.*, 57 N. Y. 1; *Vose v. Cockcroft*, 44 id. 415; *Thayer v. Marsh*, 75 id. 342; *Delany v. Brett*, 51 id. 78; *Salisbury v. Howe*, 87 id. 128; *Quinn v. Carhart*, 133 id. 579; *Cowenhoven v. Ball*, 118 id. 232.) The prevailing party is entitled to the most favorable construction of the findings to uphold the judgment. (*Hill v. Grant*, 46 N. Y. 496; *Waugh v. S. Bank*, 115 id. 46.) The proceedings for the laying of sidewalks were utterly void, and the statute, so far as it assumes to permit the common council to levy an assessment for laying sidewalks, was unconstitutional. (*Stewart v. Palmer*, 74 N. Y. 83; *Remsen v. Wheeler*, 105 id. 573; *Marsh v. City of Brooklyn*, 50 id. 280; *Newall v. Wheeler*, 48 id. 486.)

EARL, J. This action was brought by the plaintiff to recover damages to his lots bounded on Spring street in the city of Amsterdam, caused by changing the grade of the street, and also to vacate an assessment made upon the lots for sidewalks constructed in front thereof on Spring and Kimball streets. The plaintiff recovered a judgment for his damages and vacating the assessment, and that judgment is brought under review by this appeal.

(1) Except as some statute may provide for compensation to an abutting owner whose land is injured by a change in the grade of a street, lawfully made, he is without remedy, and however serious his damages may be he can receive no compensation. (*Dillon's Municipal Corporations*, §§ 990, etc.; *Radcliff's Executors v. The Mayor*, 4 N. Y. 195.) But where the title of the abutting owner extends to the center of the street, whoever, without authority of law, illegally and wrongfully excavates or otherwise interferes with the street, is responsible to him for the damages. Here the city caused the street adjoining the plaintiff's lots to be cut down several feet, and unless this was legally done by authority of law it is responsible to him for his damages. It claims that it was authorized to change the grade of the street under its charter.

(§ 95, chap. 131 of the Laws of 1885.) That section provides that the common council shall have power to cause any street "to be graded, paved or repaired," and to determine by resolution what part or portion, if any, not exceeding twenty-five per centum, of the expense thereof shall be paid by general tax upon the city, and what part or portion shall be defrayed by special assessment upon such portions of the real estate and against the owners and occupants thereof as the assessors of the city shall deem more immediately benefited by the improvement. In the same section it is provided, however, that "when the grade of a street has been established and the street graded accordingly, the grade shall not be changed and the street graded according to the changed grade, except upon petition of the owners of a majority of the lineal feet fronting on the part of the street to be graded, or unless compensation be made to the owners of property injured by the re-grading, such compensation to be determined by agreement or by the three commissioners to be appointed by the County Court of Montgomery county or the Supreme Court," etc.

Abutting owners are frequently seriously injured by changing the grades of streets in front of their property, and, as has been stated, without some special provision of law, they are without remedy. This provision in the charter of the defendant was inserted to give relief in such cases. It was intended to provide for all cases where the previously established grade of a street shall have been changed so as to cause damages to the abutting owners, and the statute must be so construed as to give effect to the policy thus indicated. Before the grade of a street which has been once established can be changed two things must occur, there must be the petition of the owners of a majority of the lineal feet fronting on the street to be graded, and compensation must be made to the owners of the property injured by the re-grading. The literal reading of this portion of the section would require only one of these two things, either the petition or the compensation. But to effectuate the plain purpose of the statute the word "or" should be "and" or "nor," and such a change in a word, to

give effect to the plain intention of the legislature, is sanctioned by many precedents. Unless the language be so read an abutting owner might be opposed to the improvement of a street in front of his premises, and yet, if a majority of the owners petitioned for the improvement, he would be without any remedy for the damages thereby caused to him. His damages are just as great whether the improvement has been petitioned for or not, and the fact of the petition should not subject him to damages without compensation. It is said that section 95 in the defendant's charter was copied substantially from section 98, chapter 150 of the Laws of 1872, the charter of the city of Kingston, and in that section the word "nor" is used in the particular provision now under consideration, instead of the word "or." So we are of the opinion that, assuming that the grade of Spring street had been once established, its grade could not be changed, except upon the petition of the owners of a majority of the lineal feet fronting upon the part of the street to be graded.

It is said, however, on the part of the defendant, that the grade of this street had never been previously established, and, therefore, that this was not a case of a change of grade. We think, upon the undisputed facts in this case, that the grade of the street had become established. It had been used as a public street for more than forty years. Houses were built compactly on both sides, conforming to the grade of the street as it then existed, and the street was graded and improved by the city and its predecessor, the village of Amsterdam. Sidewalks had been built under direction of the municipal authorities upon grades given by them, and thus it is clear that the grade had become established by long usage, and by the acquiescence and recognition of the village and the city. The claim that the grade of a street could become established within the meaning of the statute under consideration only by a formal ordinance of the municipality finds no sanction in the language used. There are many streets in cities and villages the grades of which have not been established by ordinances. They have either been left in their natural condition or worked and

improved from time to time by the municipal authorities without the formal establishment of any definite grade; and when upon such streets buildings are erected conforming to the existing grade, if that grade be changed, the mischief arises for which the provision in section 95 was intended to provide. Without referring minutely to the evidence in this case, we think sufficient appears to show that the grade had become established prior to 1887 when the defendant caused the change of the grade of which the plaintiff complains. There are precedents for the conclusion that the grade of a street may become established by usage, acquiescence and recognition without any formal ordinance on the part of the municipality. (*McCall v. Village of Saratoga Springs*, 29 New York State Reporter, 699; *Bartlett v. Village of Tarrytown*, 30 id. 341; *O'Reilley v. City of Kingston*, 114 N. Y. 439; *Whitmore v. Village of Tarrytown*, 137 id. 409.) Therefore, as there was no petition for changing the grade of this street as required by the section of the statute referred to, the defendant was wholly without authority to inaugurate the change, and its interference with the street was wrongful and illegal, and it became responsible to the plaintiff for any damages thereby caused to his property.

It also appears that the contract for doing the work was made without authority, and hence the defendant is without any justification whatever for its interference with the street in front of the plaintiff's premises.

But the claim is further made on behalf of the defendant that the plaintiff's only remedy for damages caused to him by the change of grade was that given by the section, to wit, the appraisal of the damages and the award of compensation by three commissioners. But the remedy there provided can be invoked only in the case of the lawful change in the grade of the street. Where the change is utterly illegal and void there is no authority for the appointment of commissioners, and such commissioners, if appointed, would have no jurisdiction to determine and award the compensation. Hence, the only remedy of the plaintiff was by action to recover his damages.

(2) The assessment for laying sidewalks in front of the plaintiff's premises on Spring street was utterly void for the reasons stated in the opinion of the referee. It is sufficient to condemn the assessment that it included the expense of the sidewalk on Kimball street, which the common council had not by ordinance ordered to be constructed, and which the plaintiff had not by any notice been required to construct as provided in the charter of the defendant.

Our conclusion, therefore, is that the judgment is right and should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. RIGNAL D. WOODWARD, Appellant,
v. SIMON W. ROSENDALE, Attorney-General, etc.,
Respondent.

In a declaration presented to the superintendent of insurance by persons applying for incorporation as a casualty insurance company the business proposed to be carried on was stated, among other things, to be "the inspection and certification as to the sanitary conditions of buildings and premises." In pursuance of the requirements of the Insurance Law, providing for the organization of such companies (§ 70, chap. 690, Laws of 1892), the superintendent submitted the declaration and charter to the attorney-general for certification; that officer refused to certify. In proceedings by mandamus to compel the certification, *held*, that the business so stated in the declaration was not insurance in any legal sense, but an entirely distinct kind of business not within the purview of the Insurance Law, and so the declaration was not entitled to be filed in the office of the superintendent, and the attorney-general properly refused to attach his certificate of approval thereto.

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 5, 1893, which reversed an order of Special Term granting an application for a writ of mandamus, the nature of which and the facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

Rignal D. Woodward for appellant. The words of subdivision 8 of section 70, chapter 690, Laws of 1892, must be construed to provide for the incorporation of companies to insure against casualties lawfully the subject of insurance, not otherwise provided for in the preceding subdivisions. (*McClusky v. Cromwell*, 11 N. Y. 601; *Purdy v. People*, 4 Hill, 397; Potter's Dwaris on Stat. 192.) The casualties sought to be insured against by the proposed company may lawfully be the subject of insurance; the certificate and charter presented are in accordance with law. (Laws of 1892, chap. 690, § 70.) When a ministerial duty is imposed on an officer, which he refuses to perform, on a question not of fact, but of law, then mandamus, and not certiorari, is the proper remedy. (Laws of 1893, chap. 725, § 10; *Howland v. Eldridge*, 43 N. Y. 457; *People ex rel. v. Chapin*, 104 id. 96; *People ex rel. v. Chapin*, 103 id. 635; *People v. Tremaine*, 17 How. Pr. 142; *Weed v. Beach*, 56 id. 470; *People v. C. Board*, 27 N. Y. 378; *People ex rel. v. C. Board*, 46 Barb. 254; *People v. C. Board*, 33 N. Y. 382; *People ex rel. v. Barnes*, 114 id. 317; *Swift v. Mayor, etc.*, 83 id. 535; *People ex rel. v. Beach*, 19 Hun, 259; 57 How. Pr. 337; *People ex rel. v. Rice*, 138 N. Y. 151; *People ex rel. v. Wemple*, 115 id. 302; *People ex rel. v. Wemple*, 125 id. 485.)

T. E. Hancock, Attorney-General, for respondent. The General Term properly held that the objection that mandamus was not the proper remedy was well taken. (*People ex rel. v. Chapin*, 104 N. Y. 96; *In re Howland*, 43 id. 457; *People ex rel. v. Leonard*, 74 id. 443; *People ex rel. v. Hoyt*, 66 id. 606.) The declaration and charter presented for approval did not comply with the provisions of the Insurance Law. (Laws of 1892, chap. 690; *F. Co. v. Hyde Park*, 97 U. S. 666.)

BARTLETT, J. The relator appeals from the order of the general term, third department, reversing order granting a writ of peremptory mandamus, commanding the attorney-

general to attach his certificate of approval to the declaration and charter of a proposed corporation to be called "the Sanitary Inspection and Insurance Company of New York," the relator and others having sought to organize the same under chapter 690, laws of 1892, known as "the Insurance Law." Section 70 of said act provides for the incorporation of companies to conduct the various kinds of insurances therein referred to by filing in the office of the superintendent of insurance a declaration and charter in manner and form as therein prescribed. Section 10 of said act reads as follows, viz. :

"When application is made to the superintendent of insurance by any persons desiring to become incorporated as an insurance corporation or for authority to transact the business of insurance in this state, under or pursuant to any declaration and charter presented for filing in the insurance department, or any amended declaration or charter required by law to be filed or to be approved by the superintendent, the superintendent shall not file such declaration and charter or grant such certificate of authority until such declaration and charter shall have been examined by the attorney-general and certified by him to the superintendent to be in accordance with the requirements of law."

In pursuance of this section the superintendent of insurance submitted the declaration and charter in the case at bar to the attorney-general to be examined by him and certified to be in accordance with the requirements of law. The attorney-general transmitted to the superintendent of insurance an opinion in writing, reading in part as follows, viz. :

"In reply, permit me to say that this application is made under subdivision 8, section 70 of the Insurance Law. The business proposed to be carried on is the inspection and certification as to the sanitary conditions of buildings and premises against loss or damage to life or health from causes arising from the imperfect sanitary conditions of such buildings or premises ; the insurance of landlords, lessees, tenants or occupants of houses, flats, office buildings or other structures from

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

loss occasioned by imperfect plumbing, bursting pipes or leaks, to walls, ceilings, furniture or goods; and for the doing of such other business as may be lawfully connected with the business of sanitary inspection, care and insurance, under subdivision 8 of section 70, article 2 of chapter 690 of the Laws of 1892.

"In my opinion, this is not a kind of casualty insurance such as is specified in any of the subdivisions of section 70; nor is it a kind of insurance that can be lawfully carried on under said section.

"I, therefore, decline to attach my certificate of approval to said proposed declaration and charter."

The relator thereupon applied to the special term for a peremptory writ of mandamus to compel the attorney-general to certify to the superintendent of insurance that the said declaration and charter were in accordance with the requirements of law; this application was granted. The attorney-general appealed to the general term where the order was reversed, the court holding mandamus was not the proper remedy and refusing to consider the merits of the case.

As we are of opinion that the learned attorney-general correctly decided the question submitted to him, we do not deem it necessary to consider the question of remedy discussed in the courts below. The proposed company seeks to carry on as a part of an insurance business, according to its declaration, "the inspection and certification as to the sanitary conditions of buildings and premises." This is not insurance in any legal sense, but an entirely distinct kind of business not within the purview of the statute now under consideration. We, therefore, hold that the declaration and charter of the proposed company were not in accordance with the requirements of law, and are not entitled to be filed in the office of the superintendent of insurance.

The general term order, for the reasons stated, is hereby affirmed, with costs.

All concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN CONNOR, Appellant.

The provision of the Code of Civil Procedure (§ 46) forbidding a judge from sitting as such in a cause if he is related to any party to the controversy within the degree specified, applies to all trials, civil and criminal.

Where, therefore, defendant was convicted of a crime in a Court of Sessions, one member of which was related to him within the sixth degree, *held*, that the court was without jurisdiction, the result a mistrial, and no bar to another trial.

On a second trial, before a court properly constituted, defendant interposed the plea of not guilty, also a special plea of the former trial and conviction. The pleas were directed to be and were tried separately before the same jury; the special plea being first tried, and the issue determined in favor of the People. Defendant's counsel objected to further proceedings, asking to have them suspended until the questions already tried could be reviewed on appeal. This was denied. Said counsel then asked permission to ask each of the jurors as to any bias formed from the evidence and proceedings upon the special plea. This was also denied. *Held*, no error; that defendant was not entitled to separate trials before separate jurors of the issues, but to but one trial and one jury; that the order in which the issues were disposed of was in the discretion of the court, and it had power to direct them to be tried separately or together; and that, although they were tried separately, there was but one continuous proceeding.

Reported below. 65 Hun, 392.

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 9, 1892, which affirmed a judgment of the Court of Sessions of Delaware county entered upon a verdict convicting defendant of the crime of grand larceny in the second degree.

The facts, so far as material, are stated in the opinion.

Abram C. Crosby for appellant. If the court was illegally constituted, then the defendant should have been discharged from custody on his motion made therefor, because the fact existed that he had been actually tried by the forms and pro-

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Opinion of the Court, per O'BRIEN, J.

ceedings of law and convicted, a record of such conviction had been made and the jury discharged. (*Shepard v. People*, 25 N. Y. 406.) The court erred in directing the parties to proceed to the trial of the issue formed by the defendant's plea of not guilty before the same jury that had tried the former issue, and in denying the request of the defendant that all further proceedings upon the indictment be suspended until the question already tried might be reviewed by appeal, and further that the judgment of the court upon the verdict of the jury "for the People," be entered before any further steps are taken. (1 Bishop's Crim. Pro. § 578; Code Crim. Pro. § 442.) The court erred in refusing to direct the clerk to enter a separate judgment before any further proceedings were had upon the verdict of guilty. (Code Crim. Pro. § 442.)

William F. White for respondent. The trial court did not err in refusing the defendant a new jury to try the plea of not guilty after the trial of the issue of former conviction. (Code Crim. Pro. §§ 332, 388; 1 Bishop Crim. Pro. § 812; 1 Whart. Crim. Law, § 572.) The former trial was void by reason of relationship of one member of the court to the prisoner. (65 Hun, 392; *Carter v. People*, 1 Abb. Ct. App. Dec. 308; *Shepard v. People*, 25 N. Y. 420; 1 Bish. Crim. Law, § 1028; *Ferguson v. Crawford*, 70 N. Y. 265; *Baldwin v. McArthur*, 17 Barb. 414; *Rivenburg v. Henness*, 4 Lans. 208; *Oakley v. Aspinwall*, 3 N. Y. 547; *Schoonmaker v. Clearwater*, 41 Barb. 204; 1 Abb. Ct. App. Dec. 341; Code Civ. Pro. § 46.) There is no provision of the Criminal Code providing for a separate judgment or verdict on the plea of former conviction, and the former practice was properly followed in this case. (Code Crim. Pro. §§ 332, 371, 387, 471, 472.)

O'BRIEN, J. The defendant was convicted in the Court of Sessions of the crime of grand larceny in the second degree. On the trial, which resulted in the judgment now under review, the defendant interposed the general plea of not guilty, and

also a special plea of a former trial and conviction to the indictment. These pleas were tried separately before the same jury, and the questions involved in this appeal arise upon exceptions taken upon or growing out of the trial of the issue made by the special plea. It appeared that the former trial was had before a court composed of the county judge and two justices of the peace, temporarily designated by order to serve as members of the court, by reason of the death of one of the justices of sessions and the absence of the other. One of the justices of the peace so designated was related to the defendant within the sixth degree, and so incapable of acting as a member of the court during the trial, by § 46 of the Code of Civil Procedure. The trial proceeded apparently without any knowledge of the fact, and certainly without any reference to it, and the jury found a verdict of guilty. After the verdict the fact that one of the members of the court was so related to the defendant was presented to the court by affidavits in support of a motion in arrest of judgment. The court, though holding that the motion was not based upon any defects in the indictment, nor founded upon any facts appearing on the face of the record within § 331 of the Code of Criminal Procedure, set aside the verdict, and the court having been re-constituted in a manner to obviate the objection, the indictment was continued to the next term, when the trial under review was had. A jury having been drawn and impaneled, the court directed that the issue upon the special plea be tried before that arising upon the general issue. The trial proceeded, and proof of the relationship of the justice on the former trial to the defendant was made, the defendant's identity established and all the proceedings on the first trial shown. The court instructed the jury that the plea of former conviction was not sustained unless there was in fact a lawful trial and conviction. That if the former trial was before a court, one of the members of which was related to the defendant within the prohibited degree, then the court was improperly constituted and without jurisdiction in the case; and so the result would be a mistrial, and no bar to another trial. The defendant's counsel excepted to these

instructions, and the jury determined the issue upon the special plea in favor of the People. The court then directed that the trial proceed upon the issue raised by the plea of not guilty. The defendant's counsel objected to further proceedings before the same jury, and asked that the proceedings be suspended until the questions already tried could be reviewed upon appeal, which request was denied. The defendant's counsel then asked permission to examine each member of the jury as to any bias formed from the evidence and proceedings upon the special plea that would disqualify him from serving as a juror on the trial of the general issue. The request was denied. The district attorney then gave evidence in support of the charge in the indictment, and the jury rendered a verdict of guilty.

There was no error in the charge or rulings of the court with respect to the effect of the former trial and verdict. Section 46 of the Code applies to all trials, civil and criminal. The court before which the first trial was had was so constituted that it was without jurisdiction to try the particular case, and hence all proceedings before it in the case were absolutely void. In contemplation of law there was no trial and no conviction. The trial and verdict were such only in form, without the power or jurisdiction to give to them any validity or legal effect whatever. When the verdict had been recorded, no legal result had been accomplished that had the slightest effect upon the rights or liberty of the defendant. It could not be said that he was once in jeopardy within the legal and constitutional meaning of that term, since it implies a verdict or a trial before some court possessing jurisdiction.

The request of the defendant's counsel to suspend the trial after the determination of the issue upon the special plea raises no question of law. The request to be permitted to examine the jurors before proceeding to the trial of the general issue is based upon the notion that the defendant had the right to separate trials before separate juries of each issue raised by the pleadings. There is no authority for the claim. There was but one indictment and one charge and the defend-

ant's pleas constituted his answer and defense to the accusation. He was entitled to but one trial and could demand but one jury. The order in which the issues should be disposed of was a matter in the discretion of the court, which had power to direct them to be tried separately or together, and whatever course was adopted the trial must be one continuous proceeding and the rights of the defendant with respect to the examination of the jury were the same as if the plea of not guilty alone appeared upon the record. He had no more right to stop the trial while in progress in order to ascertain the effect which the evidence given had upon the minds of the jury than he would have had if there was only a plea of the general issue. The questions in the case have been so fully and thoroughly examined by the learned judge who gave the opinion at General Term, in which we concur, that any very extended discussion now is unnecessary. The conclusion of the learned court below is so well sustained by reason and authority that we might well have disposed of the case upon the views there expressed without any formal statement of our own.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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HENRIETTA L. ROEMER, Appellant, v. JAMES A. STRIKER,
Respondent.

In an action to recover damages for injuries to plaintiff's dwelling, alleged to have been caused by negligent blasting in excavating on defendant's adjoining premises, the answer was a general denial, save as to the ownership of defendant's premises. On the trial defendant was permitted to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation. *Held*, no error; that the action was not for a trespass or the creating of a nuisance, but for negligence; that defendant was entitled under the answer to show that the act of negligence complained of was not his but that of another, and if done by an independent contractor he was not liable.

(Argued March 14, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 18, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ira D. Warren for appellant. The court erred in admitting the contract with Donohue in evidence, for the reason that no such defense was set forth in the answer. (*Weaver v. Barden*, 49 N. Y. 286; *Griffin v. L. I. R. R. Co.*, 101 id. 354; *Hay v. C. Co.*, 2 id. 160; *Tremain v. C. Co.*, Id. 163; *St. Peter v. Dennison*, 58 id. 423; *Clifford v. Dam*, 81 id. 52; *Ginterman v. N. Y. & P. S. Co.*, 9 Daly, 119.) The defendant is liable, irrespective of the contract. It is not necessary to prove negligence to maintain an action for a trespass of this kind. (*Hay v. C. Co.*, 2 N. Y. 160; *Tremain v. C. Co.*, Id. 163; *St. Peter v. Dennison*, 58 id. 423; *Robbins v. City of Chicago*, 4 Wall. 679; *W. Co. v. Ware*, 16 id. 566; S. & R. on Neg. [4th ed.] § 176; *Brusso v. City of Buffalo*, 90 N. Y. 119.)

W. F. Dunning for respondent. The contract was clearly admissible under the pleadings. (*Griffin v. L. I. R. R. Co.*, 101 N. Y. 348; *Robinson v. Frost*, 14 Barb. 536; *Wheeler v. Billings*, 38 N. Y. 263; *Weaver v. Barden*, 49 id. 286; *Milbank v. Jones*, 141 id. 340; *Clare v. N. C. Bank*, 14 Abb. Pr. [N. S.] 326.) The act contracted for being in itself lawful, and if properly done not likely to cause injury, the owner who gave out the contract is not liable for injuries sustained by the careless or negligent performance of the work on the part of the workman employed by the contractor. (*King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Hexameter v. Webb*, 101 id. 377; *Charlock v. Freel*, 125 id. 357; *Dickson v. Mayor, etc.*, 92 id. 584; *Nolan v. King*, 97 id. 565.) The appellant cannot succeed upon the theory that

the respondent promised to pay. (Code Civ. Pro. § 723; *Davis v. N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 646; *Southwick v. F. N. Bank*, 84 id. 420.)

O'BRIEN, J. The plaintiff sought to recover damages which it was alleged she sustained in consequence of injuries to her house from blasting by the defendant while excavating upon his own land for the foundations of seven houses he was engaged in building. The complaint alleged that the plaintiff owned the house which was injured, and that the defendant, in preparing to build on his lots, and in excavating the cellars, blasted the rock adjoining plaintiff's premises in so careless, negligent and reckless a manner that the walls of plaintiff's house were cracked, the plaster shaken off, the air shaft crushed and the foundations of the building injured. The answer was a general denial except as to the allegation that the defendant owned the adjoining lots, which was admitted. On the trial the defendant introduced in evidence a written contract between himself and a contractor whereby the latter agreed for a compensation stated to excavate the cellars for the houses within the time stated.

The plaintiff's counsel objected to the admission of this contract in evidence on the ground that no such defense had been affirmatively pleaded. The court overruled the objection and the plaintiff excepted. We think that there was no error in this ruling. The action was not for a trespass or for creating a nuisance by an improper or unlawful use by the defendant of his own land whereby the property of his neighbor was injured (*Booth v. R., W. & O. T. R. Co.*, 140 N. Y. 267), but for careless and negligent blasting. It was incumbent upon the plaintiff to show that this was the defendant's act, and she probably gave proof in the first instance from which the fact might be inferred. But the defendant had denied that it was his act, and he was entitled to show by proof that it was not, but in fact the act of another. He could controvert any material fact which the plaintiff was bound to prove in the first instance in order to make out her case. (*Milbank v.*

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Statement of case.

Jones, 141 N. Y. 340.) The proof tended to show that the blasting complained of was the act of an independent contractor for whose negligence the defendant was not responsible. (*Devlin v. Smith*, 89 N. Y. 470; *Butler v. Townsend*, 126 id. 105.)

This defense was admissible under the general issue, as it tended directly to the overthrow of the plaintiff's case. Some proof came out incidentally at the trial of a promise on the part of the defendant to make good the damage to the plaintiff. Entirely apart from the question whether the promise was one to answer for the debt, default or miscarriage of another, it is quite sufficient to say that the action was not brought upon any such undertaking, but on the case for negligence, and even if the proof of the agreement to pay the damages was more definite than it is, it could not be made the basis of a recovery.

The judgment dismissing the complaint is right and must be affirmed.

All concur.

Judgment affirmed.

THE SECOND METHODIST EPISCOPAL CHURCH in Greenwich,
Respondent, v. SARAH HUMPHREY, Appellant.

In an action of ejectment plaintiff claimed title under a deed to it from O. of the lot in question, which was part of a tract of land then owned by O.; after his death his son, his only heir at law, conveyed to H., under whom defendant claimed the tract; the deed reserved from the grant the lot conveyed to plaintiff. At the time of the conveyance to H. there was a fence around plaintiff's lot which had been built ten years previously. *Held*, that as the deed to H. recognized the title of plaintiff, and as its lot was practically located and identified, no one claiming under said deed could dispute such title.

(Argued March 14, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a

judgment in favor of plaintiff entered upon the report of a referee.

This was an action of ejectment.

The premises in question were claimed to have been purchased by plaintiff from one Osmer Dixon, who died in 1849. Defendant claims under a deed from Phineas Dixon, the only heir at law of said Osmer Dixon, to one Aaron M. Hyatt.

The further facts, so far as material, are stated in the opinion.

R. A. Parmenter for appellant. The complaint does not sufficiently describe the land claimed by plaintiff to be wrongfully withheld by the defendant. (Code Civ. Pro. § 1511.) The report of the referee does not conform to the requirement of section 1519 of the Code of Civil Procedure. The judgment is also defective. (*Rogers v. Sinsheimer*, 50 N. Y. 646-649.) This being an action of ejectment, the plaintiff must stand or fall upon the strength of its own title and not upon the defect in or weakness of the defendant's title, she being in the actual possession. (Code Civ. Pro. §§ 370-375; *Pope v. Hammer*, 74 N. Y. 240; *Howell v. Leavitt*, 95 id. 617.) The plaintiff having entered upon that part of the Dixon lot in dispute, and having erected a fence without color of title, its possession, whatever it was, must for the purposes of this action be presumed to have been in subservience to the legal title, so that adverse possession never did commence, and no length of time will enable such possession to become adverse and ripen into title sufficient to maintain ejectment. (*Jackson v. Thomas*, 16 Johns. 293.) The defendant by her deed produced in evidence by the plaintiff itself established a legal title to the disputed premises in herself, and under section 368 of the Code of Civil Procedure she is presumed to have been possessed of such premises within the time required by law, and the occupation of the premises by the plaintiff is deemed to have been under and in subordination to such legal title, unless the plaintiff by competent evidence has shown that it had been held and possessed adversely to the legal title for

twenty years before the commencement of this action. This legal presumption has not been overcome by the testimony produced on the trial. (*Sherman v. Kane*, 86 N. Y. 64; *Doherty v. Matsell*, 119 id. 646.)

C. C. Van Kirk for respondent. The referee found, and the General Term sustained it, that plaintiff had title to said premises by adverse possession and was in possession when defendant entered the premises and ousted plaintiff. This finding is correct. (Code Civ. Pro. §§ 371, 372; *La Frombois v. Smith*, 8 Cow. 589; *Barnes v. Light*, 116 N. Y. 34, 39; *Jackson v. Haren*, 7 Cow. 327; *Baker v. Oakwood*, 123 N. Y. 16.) The defendant contends that plaintiff has not established title by adverse possession because in 1856 Phineas Dixon, sole heir of Osmer Dixon, was a minor and did not come of age until September, 1865. This claim is untenable. (*Howell v. Leavitt*, 95 N. Y. 617; Code Civ. Pro. §§ 371, 372; *Becker v. Church*, 115 N. Y. 562.) There is no dispute in this action that plaintiff owns a lot of some size within the premises described in the complaint; it owns at least the land on which the church building stands and the lands south and west of the building. Every conveyance of the lands now held by defendant recognizes the "lot of land sold to the Methodist church," which, it is conceded, means plaintiff. The boundary line between plaintiff's and defendant's lands has been established. (*Reed v. Farr*, 35 N. Y. 113; *Jones v. Smith*, 64 id. 180; *Baldwin v. Brown*, 16 id. 359; *Sherman v. Kane*, 86 id. 57; *Gibney v. Marchay*, 34 id. 301; *Donohue v. Case*, 61 id. 631.) From the foregoing it is clear that the possession of plaintiff prior to the entry of defendant was sufficient *prima facie* proof of title to entitle the plaintiff to recover in this action unless the defendant showed a better title. (*Jones v. Smith*, 64 N. Y. 182; *Mayor, etc., v. Carlton*, 113 id. 284.)

Per Curiam. The deed from Phineas Dixon to Hyatt reserves from the grant the lot sold to the plaintiff. It is

through this deed that defendant claims title. Her mediate grantor, Phineas Dixon, thus not only reserves the plaintiff's lot from the conveyance to Hyatt, but he recognizes the title of the plaintiff and admits its existence. The evidence in the case plainly locates the lot thus sold. At the very time of the conveyance to Hyatt, there was a fence around the lot of the plaintiff, as now claimed by it, and the fence had been built at that time for at least ten years. The lot sold the plaintiff is thus identified and located practically. No one claiming through the Hyatt deed can dispute the title of the plaintiff to the lot which had been sold to it.

We see no error in the record and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

MARY S. MARTIN et al., as Executrices, etc., Respondents, v.
GEORGE HILLEN, Appellant.

In an action by the executors of a deceased wife against the husband to recover for the conversion of certain bonds alleged to belong to the decedent's estate, defendant claimed title; he offered in evidence reciprocal wills executed by his wife and himself some years prior to that of which plaintiffs were the executors. It was not claimed that either of said wills existed or were in force at the time of the wife's death, and neither in terms referred to the bonds in question. *Held*, that said wills were properly excluded.

Under the provision of the Code of Civil Procedure (§ 829) prohibiting a party to an action from testifying in his own behalf against the executor or administrator of a deceased person, as to a personal transaction or communication with the deceased, except when the executor or administrator has testified in his own behalf in reference thereto, the exception is confined strictly to the transaction testified to by the personal representative; the party may not be permitted to testify to another and independent personal transaction, for the purpose of explaining, impairing or contradicting the testimony so given.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

142	140
153	850

142	140
164	245

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made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

This action was brought by plaintiffs, as executrices of Anna Hillen, deceased, to recover damages for the alleged conversion of certain railroad bonds.

The facts, so far as material, are stated in the opinion.

Charles J. Patterson for appellant. The court erred in excluding the evidence of the defendant relating to the property of his wife on the ground that it concerned a personal transaction with the deceased. (Code Civ. Pro. § 829; *Sweet v. Low*, 28 Hun, 432.) A similar error was made in excluding the question by which it was intended to show that Mrs. Hillen accounted to her husband for the interest moneys on the bonds which had passed into her hands. (*Potts v. Myer*, 86 N. Y. 302; *Nay v. Curley*, 113 id. 575; *Marsh v. Brown*, 18 Hun, 319; *Lewis v. Merritt*, 98 N. Y. 209.) It is submitted that the exclusion of the answer to the question: "During all this time was your wife handling money belonging to you?" in no wise transgresses the rule of section 829 of the Code of Civil Procedure. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Nay v. Curley*, 113 id. 575; *Wadsworth v. Heermance*, 85 id. 639.) The court erred in refusing to direct a verdict for defendants, because the proof of the defendants' title to the bonds was so preponderating that a verdict against it would be set aside as contrary to evidence. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Warner v. E. R. Co.*, 44 id. 465.)

James Troy for respondents.

O'BRIEN, J. The plaintiffs are the children by a prior marriage, and the personal representatives of the defendant's deceased wife, who died in the year 1890, leaving a will. They have recovered judgment against the defendant for the conversion of seven railroad bonds of the value of \$8,050, which it was alleged belonged to their testatrix at the time of

her death. The only question litigated at the trial was, whether the bonds in fact were owned by the deceased at the time of her death, or by the defendant, her husband. On this question the evidence was almost entirely circumstantial. It tended to prove that for some twelve years before her death the deceased owned several bonds of this character which she sometimes carried upon her person, and when at home she kept in a bureau drawer, and sometimes in a box or bag in her trunk, and that her daughters, the plaintiffs, were in the habit of collecting for her the coupons detached from the bonds as they matured, up to the time of her death. She kept accounts in savings banks in her own name, which it was claimed represented, in part at least, the interest received by her from time to time upon these securities. During her last illness she kept the key of the trunk containing the bonds under her pillow. Immediately after her decease the defendant's niece, by his direction, procured the key and delivered it to him. He then opened the trunk and procured the bonds, refusing to deliver them to the plaintiffs. There was also some proof given of admissions by the defendant tending to show that he recognized the ownership in his wife of the bonds. On the other hand the defendant gave proof tending to show that he purchased the bonds about ten years before, and that the possession and use of the bonds by the deceased was for him and under his permission. In this state of the proof the learned trial judge submitted the question to the jury, and a verdict for the plaintiffs was found, which, we think, has settled the disputed fact. The finding is based upon circumstances and facts that were fairly open to different inferences, and hence the question was one for the jury. Since it cannot be said that the verdict is without any evidence to sustain it, we are concluded by the finding of the jury that the deceased was the owner of the bonds at the time of her death.

There were some exceptions taken in behalf of the defendant during the progress of the trial that are now urged as ground for reversal. The defendant's counsel produced

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reciprocal wills made by the husband and the wife in which each disposed of all property in favor of the other, bearing date July 28, 1885, and offered them in evidence, but they were excluded by the court, upon the plaintiffs' objection, to which the defendant excepted. It was not claimed that either will existed or was in force at the time of the wife's death, and it in fact appeared that the one made by the wife was revoked by the subsequent will under which the plaintiffs claimed title. The contention of the learned counsel for the defendant is that these wills tended to prove such harmonious relations between the husband and wife and such a degree of affection and confidence existing between them, with respect to the property of each, as to explain the character of the wife's possession of the bonds and to weaken the plaintiffs' position that she had them as owner in her own right and not as the agent or custodian of the husband. We think that the conclusion sought to be drawn from the fact of the execution of the instruments is so remote and uncertain that it cannot be deemed a legal or logical result of the facts sought to be proved. There was not a word in the will of either that was in the slightest degree inconsistent with the claim that the wife owned the bonds at the time of her death. The instruments in themselves proved nothing as to who owned the bonds, and they did not in any degree tend to explain or contradict any fact or circumstance upon which the plaintiffs' case depended. If they tended to prove any material fact whatever it was that the wife, at the time she made the will, owned some property, at least, which she disposed of in favor of her husband, and it would be difficult to gather from the record what that property was unless she then had the bonds in question, but in this view it was a circumstance against rather than in support of the defendant's claim. I am not aware of any principle or rule of evidence that permitted the defendant to sustain his case by proof of this character. The instruments would furnish a basis for arguments on both sides which might enable them to draw remote and uncertain inferences, not the natural or legal result flowing from the exist-

ence of the fact itself, and could have no other result than to confuse and mislead the jury, and, therefore, it was not error to exclude the proof.

One of the plaintiffs testified in her own behalf to a personal transaction with the deceased at a certain time and place, in the course of which, as she swore, she saw the bonds in her possession, and further, that she had collected the interest on the securities for her mother during several years.

The defendant, when testifying in his own behalf, was asked certain questions involving personal transactions with the deceased, tending to show that the bonds belonged to him, and that his wife had the custody and use of them by his consent. That part of the question involving personal transactions was objected to by the plaintiffs as incompetent under § 829 of the Code, and the defendant excepted. These exceptions all involve the same principle, and may be considered as one. Section 829 recognizes the right of a party, suing as executor or administrator, to testify in his own behalf to a personal transaction or communication between the witness and the deceased, if it is otherwise competent. In that case the adverse party may also testify against the executor or administrator, but the testimony, if it involves a personal transaction or communication with the deceased, must be confined strictly to the same transaction or communication to which the executor or administrator has already testified in his own behalf. It was competent for the defendant, if he could, to testify in regard to the same transaction referred to by the plaintiff in her testimony. (*McLaughlin v. Webster*, 141 N. Y. 76.) Confining himself to that transaction he could testify to any fact or circumstance that was a part of or involved in it that tended to contradict or weaken the plaintiffs' version of it. But he could not explain, impair or contradict the plaintiffs' version by means of another and independent personal transaction or communication between himself and the deceased. The contention of the defendant's counsel is that the defendant could testify to any fact or circumstance that concerned the transaction testified to by the plaintiff, and any new or inde-

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pendent personal transaction, between the defendant and the deceased, that tended to contradict it, or show that it could not have occurred, was evidence of that character and admissible. We think that such a construction of § 829 is not permissible. The words "*concerning the same transaction or communication*" were inserted in the section for the very purpose of rendering such a construction impossible. It would open the door for the admission of all the evils which the section was intended to prevent and would go far towards repealing it entirely, since the testimony of the executor or administrator bringing the action, in his own behalf, to a single distinct personal transaction or communication, would open the way for the adverse party to testify to any other personal transaction or communication, or to any number of them, upon the ground that they tended to explain or contradict the single transaction or communication given in evidence by the plaintiffs. This would practically defeat the purpose which the legislature had in view. The defendant was asked by his counsel when on the stand, whether his wife, during the time when she had the bonds, was not handling money for him. This question was objected to by the plaintiffs, the objection stating no ground, and it was sustained and the defendant excepted. Notwithstanding the objection the witness stated that he had sent money upstairs by the clerk from the store, it appearing that the parties lived over the store. He said it was sent up every day until the deceased broke her leg, which was a few months before her death. In this view the ruling did not injure the defendant, but if the question was intended to draw out some other fact it was expressed in such vague language that it is impossible to say that the ruling was legal error. If the defendant had said that during all this time the deceased was handling money for him, that fact could have no legal bearing upon the question at issue, which was the ownership of the bonds. Handling money, unless it meant just what the defendant testified to, expressed such a vague and uncertain idea and was so far foreign to the point in controversy that the trial court might well have excluded proof of the fact what-

ever it was. At least the proof could not furnish a basis for any legitimate inference as to who owned the bonds in question.

The judgment must, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

THE EXCELSIOR BRICK COMPANY, Appellant, v. THE VILLAGE
OF HAVERSTRAW, Respondent.

Under the provision of the Village Incorporation Act (§ 1, tit. 7, chap. 291, Laws of 1870) constituting the board of trustees of a village its commissioners of highways and giving to the board power to discontinue a street, a resolution of the board discontinuing a street is sufficient for that purpose. The provision of the Revised Statutes (2 R. S. 502, § 2) requiring the certificate of twelve freeholders in order to authorize the discontinuance of a highway by commissioners, does not apply to villages incorporated under said act, and the requirement in the act of a petition of freeholders, applies to the opening or altering of a street, not to the discontinuance thereof.

The provision of the Revised Statutes (1 R. S. 520, § 99; amended by chap. 811, Laws of 1861) which declares that a highway that has ceased to be travelled or used as such "for six years shall cease to be such for any purpose," applies to streets in villages incorporated under the general act.

In an action to restrain defendant, a village incorporated under the general law, from interfering with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, in 1887, after the discontinuance, entered into possession and inclosed the same with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who has since used and occupied the same. *Held*, that as against defendant, plaintiff's possession was a sufficient title to sustain the action.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Irving Brown for appellant. The streets now claimed by defendant were not used by the public for more than six years and parts were never opened, and thus ceased to be public streets for any purpose. (*Horey v. Vil. of Haverstraw*, 124 N. Y. 273.) The order of discontinuance was effectual. The General Village Act gave the trustees the power. (Birdseye's Statutes, 3290; *In re Livingston Street*, 82 N. Y. 621; *People v. Hair*, 29 Hun, 125; *Gloucester v. Essex*, 3 Met. 379; *Sprague v. Waite*, 17 Pick. 315.) It appears distinctly that the plaintiff purchased its property upon the faith of discontinuance of the streets in question by the board of trustees, and it appears that such purchase was made after the passage of that resolution, and it was in reliance upon such discontinuance. If this be so, the village is estopped from setting up the invalidity of its act. (Dillon on Mun. Corp. § 969; *Moore v. Mayor, etc.*, 73 N. Y. 238; *Peck v. Burr*, 10 id. 294; Bigelow on Estoppel [4th ed.], 525; *Sewell v. City of Cohoes*, 75 N. Y. 51.)

E. A. Brewster for respondent. The plaintiff has no right to maintain this action, without showing title in itself for the land embraced in that part of Division street where the defendant's acts complained of were done. This the plaintiff failed to do. It expressly appeared that the plaintiff's title ceased at the outer lines of the street. (*K. C. Ins. Co. v. Stevens*, 87 N. Y. 287; *Blackman v. Riley*, 138 id. 318; Pom. Eq. Juris. § 379.) The resolution of the board of trustees of Haverstraw adopted June 14, 1887, is void. It does not purport to be an alteration of any street or highway. (Laws of 1870, chap. 291, § 1; *People ex rel. v. Hair*, 29 Hun, 125.) Commissioners of highways have no power to discontinue a highway without the certificate of twelve freeholders certifying that it has become unnecessary. (1 R. S. chap. 16, tit. 1, art. 1, § 2; Thompson on Highways, 185;

Town of Galatin v. Loucks, 21 Barb. 578.) The village of Haverstraw is not estopped by the resolution of June 14, 1887, from claiming that Division street is a public highway, and from proceeding to put it in order for public use. (*Driggs v. Phillips*, 103 N. Y. 77; *Trenton v. Duncan*, 86 id. 221; *Cuyler v. City of Rochester*, 12 Wend. 165.)

EARL, J. The plaintiff commenced this action to restrain the defendant from interfering with its land and causing an irreparable injury thereto, and also to recover damages caused by the defendant thereto. The defendant claimed that the land was in a public street and that it was, therefore, authorized to interfere therewith in the improvement of the street, and upon that ground the complaint was dismissed.

It is not disputed that the land in question constituted a street at some time prior to the acts complained of by the plaintiff, but it claims that the street had been discontinued and had thus ceased to exist. In June, 1887, the trustees of the village of Haverstraw formally adopted a resolution discontinuing the portion of Division street now in question, and the plaintiff claims that that resolution was effectual to discontinue the street. But the court below held that it was ineffectual for that purpose for the reason that the certificate of twelve freeholders was not obtained before the passage of the resolution.

The defendant was incorporated as a village under the general act for the incorporation of villages, chapter 291, Laws of 1870, in section 1, title 7, of which it is provided as follows: "A village incorporated under this act shall constitute a separate highway district within its corporate limits exempt from the superintendence of any one except the board of trustees, who shall be commissioners of highways in and for such village, and shall have all the powers of commissioners of highways of towns in this state, subject to this act, and as such they shall have power to discontinue, lay out, open, widen, alter, change the grade, or otherwise improve roads, avenues, streets, lanes, crosswalks and sidewalks; and

for that purpose may take and appropriate any land in said village; but no road, avenue, street, lane or sidewalk shall be opened or altered unless all claims for damages on account of such opening or altering shall be released without remuneration except on the written petition of at least ten freeholders residing in said village, which petition shall specify the improvement to be made, describe the land to be taken, state the owner or owners thereof, when known, and shall be filed in the office of the clerk of the village." This section gives the trustees, as commissioners of highways, full power to discontinue, lay out and alter streets within the village, subject, however, to the limitation that they shall not open or alter any street where the damages have not been released, except upon the written petition of at least ten freeholders residing within the village. It is clear but for that exception that they could open or alter any street without any petition, and the exception does not apply to the discontinuance of a street. If it had been intended to limit the powers of the trustees to discontinue a street by the condition precedent of the petition of the freeholders it would have been so provided. In the general laws relating to highways and highway commissioners (2 R. S. 1238, etc., 7th ed.) it is provided that highway commissioners may not, in the cases specified, open, alter or discontinue highways without the certificate of twelve freeholders. It certainly could not have been the intention of the lawmakers that before any street in this village could be opened or altered, there was not only to be the written petition of the ten freeholders as provided in section one, but also the certificate of twelve freeholders as provided in the general highway laws of the state.

We think that the special requirement of the petition of the ten freeholders in the case of opening and altering a street indicates very clearly that a street may be discontinued by the trustees without any petition or certificate of freeholders. It cannot be supposed that the legislature would authorize the laying out and altering of a street upon the unsworn petition of any ten freeholders and require the certificate of twelve

disinterested freeholders, summoned and acting under oath, before a street could be discontinued; and this construction of the language used in this section is in harmony with the decisions in *People v. Hair* (29 Hun, 125), and in *The Matter of the Village of Rhinebeck* (82 N. Y. 621), where similar provisions in other village charters were construed. The difference in the language used in the charters there under consideration from the language used in the section now under consideration is not sufficient to warrant a different construction.

We think, therefore, that the resolution of the defendant's trustees was effectual to discontinue the portion of Division street now under consideration.

But it had ceased to be a street for another reason. It was found by the trial judge that the part of Division street now in question "had not been used or traveled by the public for more than six years prior to the commission of the acts complained of;" and in the general highway laws of the state (2 R. S. 1249, 7th ed.), it is provided that all highways that "have ceased to be traveled or used as highways for six years shall cease to be a highway for any purpose." In *Horey v. Village of Haverstraw* (124 N. Y. 273) that provision was held applicable to a street in that village, and under the authority of that case, upon the finding of the trial judge, this portion of Division street had ceased to be a street prior to the commission of the acts complained of in this action.

But the claim is made on the part of the defendant that the plaintiff had no title to the land upon which the acts complained of were committed, and that, therefore, it could not maintain this action. But the finding of the trial judge is, "that prior to 1887 John Derbyshire became the owner of lands in Haverstraw, N. Y., lying between Rockland street and the Hudson river, and located on both sides of that part of Division street, so called, where some of the acts complained of were committed, and on both sides of Allison street, so called, where other of such acts were committed.

"That about June 14th, 1887, said Derbyshire inclosed

said portions of said streets with his own land by a fence, and entered into the possession of and occupied and used the same under claim of title in common with his adjoining lands down to January, 1890, when he conveyed all of his said lands, and all of his right, title and interest in and to said streets to the plaintiff, who has ever since enjoyed like possession and use;" "that the plaintiff has owned and used its said property as stated in paragraph two of the amended complaint;" and in that paragraph the allegation is "that the plaintiff is and for some time has been the owner of certain lands in said village of Haverstraw, lying between Rockland street in said village and the Hudson river, which lands have during such period been used and occupied mainly for the purpose of carrying on the business of manufacturing bricks and the excavation of materials necessary for use in such business." And he found, as a conclusion of law, that the possession of the plaintiff was a sufficient title, as against the defendant, to the lands embraced within the lines of the streets in question.

While we may look into the evidence given upon the trial for the purpose of sustaining the findings of the court, we are not authorized to look into it for the purpose of reversing findings of fact and law to which no exceptions have been taken; and we must, therefore, take these findings as conclusive for the purposes of the present appeal, and hold that the plaintiff, in the absence of any right whatever on the part of the defendant, had sufficient title and possession for the maintenance of this action.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

DE WITT C. REED, Respondent, v. NATHANIEL CHILSON et al.,
Appellants.

The service of a general notice of retainer and a general appearance in an action by an attorney for a non-resident defendant is equivalent to personal service of the summons and gives the court jurisdiction of the person of such defendant.

It seems, when a non-resident does not intend to submit himself to the jurisdiction of the court, he may either appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to take judgment by default; the question of jurisdiction will be available if he has not waived it by his own act.

In an action to recover money, brought upon a Michigan judgment, the summons was served out of the State, pursuant to an order of publication, upon defendants who were non-residents. A warrant of attachment was also issued, but no property was levied upon. Defendants entered a general appearance by an attorney, who served a general notice of retainer. An answer was served alleging that neither of the defendants were residents of the state nor had they any property therein, and that the court had no jurisdiction. *Held*, that the appearance and notice gave jurisdiction; and that a personal judgment was properly rendered.

The answer also set up a former judgment against defendants, recovered in this state upon the same cause of action. It appeared there was no service of process within the state in the former action, no appearance by defendants and no levy upon property by attachment. *Held*, that the court had no jurisdiction in the former action (Code Civ. Pro. § 1217), and so, the judgment therein was void and not a bar.

(Argued March 16, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made June 2, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

This was an action brought upon a judgment recovered by plaintiff against the defendants in a court of the state of Michigan on August 9, 1887.

The facts, so far as material, are stated in the opinion.

Myron H. Peck, Jr., for appellants. The case was tried upon the theory that if it appeared on the trial as undisputed

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facts that neither of the parties were residents of the state of New York, that the cause of action did not arise in that state, and that no property of the defendants was within the state of New York, then the defendants were entitled to judgment. The learned justice at Special Term so holds in deciding the former judgment to be void. It was necessary for the defendants to appear in the action and to present these facts to the court, as they did not appear on the face of the complaint in this action. (*Hamburger v. Baker*, 35 Hun, 455; 1 Rumsey Pr. 178, 179.) The notice of appearance served herein was not a voluntary general appearance. (Code Civ. Pro. § 421; *Couch v. Mulhane*, 63 How. Pr. 79; *Valentine v. Myers*, 36 Hun, 201; *Douglas v. Haberstro*, 8 Abb. [N. C.] 230.) No property of the defendants having been levied upon at the time of the service of the answer, or at any time afterwards, the court did not acquire jurisdiction of the subject-matter of the action. (*Fiske v. Anderson*, 33 Barb. 71; *Kinney v. Collins*, 88 N. Y. 216; Code Civ. Pro. § 439; *McVey v. Cantrell*, 1 Hun, 710; *Stone v. Miller*, 62 Barb. 430; *C. C. Bank v. Parent*, 20 Civ. Pro. Rep. 38; *Tracey v. Corse*, 58 N. Y. 143-151; *Plimpton v. Bigelow*, 93 id. 592; *Robinson v. O. S. N. Co.*, 112 id. 315; *T. G. C. Co. v. Smith*, 110 id. 83; *Antony v. Wood*, 96 id. 180.)

Edwin McKnight for respondent. The service of the notice of retainer was "an appearance by each of the defendants in the action." It was signed by defendants' attorney with his office address. (Code Civ. Pro. §§ 417, 421.) The service of the notice of retainer was a general appearance by each of the defendants in the action. (*Webb v. Mott*, 6 How. Pr. 440; *Gardner v. Teller*, 2 id. 241; *Olcott v. McLean*, 73 N. Y. 223; *Pomeroy v. Ricketts*, 27 Hun, 242; 91 N. Y. 668. *Olcott v. McLean*, 73 id. 223; Code Civ. Pro. § 424; *Jones v. Jones*, 108 N. Y. 415-425; *Carroll v. Lee*, 22 Am. Dec. 350; *Allen v. Malcolm*, 12 Abb. [N. S.] 338, 339; *Mahaney v. Penman*, 4 Duer, 603; *Murray v. Vanderbilt*, 39 Barb. 140; *Morse v. Stanton*, 51

N. Y. 649.) The jurisdiction which the court obtained over the person of the defendants by the service of the notice of retainer was not divested by the subsequent answers interposed. (*Olcott v. McLean*, 73 N. Y. 223; *Carroll v. Lee*, 22 Am. Dec. 350; *Palmer v. P. M. L. I. Co.*, 10 Wkly. Dig. 179; *Jones v. Jones*, 108 N. Y. 415; *Carpenter v. Minturn*, 65 Barb. 293; *O. R. R. Co. v. C. R. R. Co.*, 63 N. Y. 180; *McCormick v. P. C. R. R. Co.*, 49 id. 309; *Catlin v. Rick*, 91 id. 669; *Brown v. Nichols*, 42 id. 30.) The court had jurisdiction of the cause of action set forth in the complaint. In those cases in which an appearance does not give jurisdiction the fault was the court had no power to hear and determine the particular case for some other reason than that the defendant had not been properly brought into court. (*G. P. R. Co. v. Mayor, etc.*, 108 N. Y. 276; *Burdick v. Freeman*, 120 id. 420; *Whcelock v. Lee*, 74 id. 495; *Landers v. S. I. R. Co.*, 53 id. 450-460; *Buckle v. Erhardt*, 3 id. 132.) The fact that no property was levied upon by the warrant of attachment at the time of service of the answer, or thereafter, is immaterial. (Code Civ. Pro. § 655.)

O'BRIEN, J. The plaintiff has recovered upon a judgment rendered in the courts of Michigan for a deficiency arising upon foreclosure and sale of mortgaged premises in that state in the year 1887. When the present action was commenced the plaintiff and one of the defendants were residents of Michigan, and the other defendant a resident of North Dakota. In December, 1889, the summons in this action was served upon both defendants without the state, pursuant to an order of publication. A warrant of attachment was also issued to the sheriff of the county where the action was brought, but no property was levied upon. On the 30th of January, 1890, the defendants entered a general appearance in the action by an attorney of the court, who served a general notice of retainer. In April following an answer was served by the same attorney, alleging that neither of the defendants

were residents of the state or had any property therein, and that the court had no jurisdiction of the action. It also alleged that in the year 1886 the plaintiff recovered in the courts of that state a judgment upon the identical cause of action contained in the complaint, and that such judgment was a bar to this suit. The appeal, therefore, presents two questions: (1) Whether the court had jurisdiction to render this judgment. (2) Whether the former judgment is a bar.

The service of the notice of retainer was a voluntary general appearance in the action, and equivalent to personal service. (Code Civ. Pro. § 424; *Olcott v. MacLean*, 73 N. Y. 223; *Ward v. Roy*, 69 id. 96; *Og. & L. Ch. R. R. Co. v. V. & C. R. R. Co.*, 63 id. 176; *Jones v. Jones*, 108 id. 415; *Mors v. Stanton*, 57 id. 649.)

It is urged that the defendants were obliged to appear and present the facts to the court or suffer default, and, therefore, the appearance was not voluntary. This does not change the effect of the appearance. When a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act. But if the defendant elects to come before the court and there try the questions, he cannot afterwards deny the jurisdiction, or be heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action. It was the judgment of the courts of a sister state which the plaintiff had the right to enforce here if jurisdiction of the person could be obtained, though the defendant resided in another state. The former judgment was not a bar, as it was void for want of jurisdiction. There was no service of process within the state, no appearance by the defendants and no levy upon property under an attachment. In the absence of personal service within the

state or a general appearance, the court had no jurisdiction to render the judgment without proof of the granting of an attachment and a levy by virtue thereof upon property of the defendants within the state. (Code, § 1217.) There was no such proof made, and it is not claimed that the facts existed upon which it could have been made. Without it, mere service out of the state, though in pursuance of an order of publication, did not give jurisdiction to render the judgment.

It follows that the judgment is right and should be affirmed, with costs.

All concur.

Judgment affirmed. _____

ROSA WILLIAMS, Respondent, v. PALMER G. WILLIAMS et al.,
Appellants.

In an action of ejectment plaintiff claimed title under a deed from W. Defendants were in possession claiming as heirs at law of W.; the latter continued in possession after the conveyance to plaintiff. Defendants offered to prove on the trial the declarations of W., made to third persons after his conveyance to plaintiff and when he was in possession, to the effect that his intent was not to make an absolute conveyance to plaintiff, but he had divested himself of title to avoid threatening embarrassments of litigation. *Held*, that such declarations were inadmissible, and so were properly rejected.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action of ejectment.

The facts, so far as material, are stated in the opinion.

Lynn J. Arnold for appellants. The delivery of a deed is a question of intention. (Devlin on Deeds, §§ 260, 261, 324.) The handing of a deed to the grantee named therein does not of itself constitute a valid and legal delivery. (Devlin on Deeds, §§ 262, 269, 324; *Denis v. Vilati*, 96 Cal. 223; *Ford*

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v. *James*, 2 Abb. Ct. App. Dec. 162; *Deitz v. Farish*, 79 N. Y. 520.) Parol evidence is admissible to show that a deed was never in fact delivered with intent to effectuate a conveyance. (*Roberts v. Jackson*, 1 Wend. 478; *Ford v. James*, 2 Abb. Ct. App. Dec. 162; Jones on Const. of Com. Cont. §§ 163, 164, 165; *Black v. Lamb*, 12 N. J. Eq. 116.) Declarations of Benjamin R. Williams, the grantor named in this deed, made while in possession of the property described therein and in possession of the deed offered on part of defendants, were admissible. (*Van Valen v. Schermerhorn*, 22 How. Pr. 416; *Abeel v. Van Gelder*, 36 N. Y. 513; *Morss v. Jacobs*, 33 How. Pr. 90; *Morss v. Salisbury*, 48 N. Y. 636; *Sweettenham v. Leary*, 18 Hun, 384; *Edmonston v. Edmonston*, 13 id. 133; *Jackson v. Vredenburg*, 1 Johns. 163; *Jackson v. Van Deusen*, 5 id. 144; *Loos v. Wilkinson*, 110 N. Y. 195; *People v. Gardner*, 73 Hun, 67.) The refusal of the trial judge to charge the jury that the fact that Benjamin R. Williams was in possession at the time of his death, and that the papers were found in his possession at that time, establishes *prima facie* title in the defendants, was error. (*Frantz v. Ireland*, 66 Barb. 386; *Whiton v. Snyder*, 88 N. Y. 299.) The evidence fails to establish a legal delivery of the deed. (Gerard on Titles, 545; Devlin on Deeds, § 324; *Ford v. James*, 2 Abb. Ct. App. Dec. 159; *Deitz v. Farish*, 79 N. Y. 520; *Denis v. Vilati*, 96 Cal. 223; *Whiton v. Snyder*, 88 N. Y. 299; *Gray v. Barton*, 55 id. 68; *Curry v. Powers*, 70 id. 212; *Young v. Young*, 80 id. 422; *Jackson v. R. Co.*, 88 id. 521.)

Giles B. Everson for respondent. The consideration for deeding property to plaintiff was ample. Besides the money paid there was other valuable consideration expressed in the deed and as a matter of fact. (*Rockwell v. Brown*, 54 N. Y. 213.) The intent of Benjamin R. Williams to deliver the deed to plaintiff and to vest the title in her immediately is manifest from his own declarations. (*Spencer v. Carr*, 45 N. Y. 406.) Where both parties are present at the time when a communication is made by one of them to his attorney

or counsel, there is nothing confidential in the communication. (*Whiting v. Barney*, 30 N. Y. 330; *Britton v. Lorenz*, 45 id. 51, 57; *Coveney v. Tannahill*, 1 Hill, 33.) So if the deed has been lost, or is in the hands of the adverse party, who refuses to produce it upon the trial, or for the purpose of the suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof, although in the preparation of such deed he was professionally employed. (*Bank of Utica v. Mersereau*, 3 Barb. Ch. 597, 598.) An attorney employed to draw a deed is competent to testify as to the directions received by him from the parties, and as to the transaction between them at the time. Knowledge acquired under such circumstances is not within the class of privileged communications. (*Hebbard v. Haughian*, 70 N. Y. 54; *Brennan v. Hall*, 14 N. Y. Supp. 864; *Greer v. Greer*, 12 id. 778; *Martin v. Platt*, 4 id. 539; *Hurlburt v. Hurlburt*, 128 N. Y. 420; *Rosseau v. Bleau*, 131 id. 177.) The declarations of a grantor cannot be used to defeat his conveyance. Nor are declarations, confessions or admissions of his to be admitted against the grantee. (*Vrooman v. King*, 36 N. Y. 477; *Crowder v. Hopkins*, 10 Paige, 183; *Jackson v. Aldrich*, 13 Johns. 106, 107; *Wells v. O'Connor*, 27 Hun, 426; *Jones v. Jones*, 137 N. Y. 610.) A deed cannot be delivered to the grantee as an escrow to take effect upon a condition not appearing upon its face. Such a delivery is absolute at law. (*Worrall v. Munn*, 5 N. Y. 229; *Arnold v. Patrick*, 6 Paige, 310; *Wallace v. Berdell*, 97 N. Y. 24; *Spencer v. Carr*, 45 id. 410.)

GRAY, J. The plaintiff has recovered a verdict, in ejectment, against these appellants; who were in possession of certain lands, claiming as heirs at law of Benjamin R. Williams deceased. The plaintiff claimed to own the lands in fee, and to be entitled to their possession, under a deed executed and delivered to her by Williams in April 1890. There was sufficient evidence, with respect to the making of this deed, its delivery to the plaintiff and the consideration for the grant,

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to support the verdict of the jury and it will not be disturbed, in the absence of any material errors committed upon the trial. The appellants, however, rely upon exceptions to certain rulings by the trial judge; of which we need only consider those by which were excluded the declarations of the grantor, Williams, made to third persons, after his grant of the lands, and which were offered by the defendants, to prove that he had not intended to make an absolute conveyance to the plaintiff. It was their theory that he had only divested himself of his property to avoid threatening embarrassments of litigation; out of which he eventually came, free of trouble. We think his declarations were wholly inadmissible as against his grantee. Their admissibility is sought to be defended upon these grounds; that the grantor remained in possession and his declarations were proper to characterize that possession; that they were admissible to show the intent with which the deed was executed and that they were admissible as part of the *res gestæ*. But all of these grounds are answered by the fact that Williams had executed and delivered to plaintiff the deed of these lands, and was not in their possession under any claim of title. If the action had been by creditors to set aside the conveyance, upon the ground of its having been fraudulently made, the declarations of the grantor would then have been admissible to characterize his possession. (*Loos v. Wilkinson*, 110 N. Y. 195, 211.) In such a case, as it was said in *Loos v. Wilkinson*, they would be regarded as in the nature of *res gestæ* declarations and competent on the question of the grantor's fraud. But there is no such question in this case, and there is no occasion to depart from the long-settled and familiar rule that the declarations or acts of a grantor, subsequently to his grant, will never be permitted to be shown in disparagement, or to the prejudice, of his grantee's rights. (1 Phil. Evid. [C. & H.'s Notes] 223; *Jackson v. Aldrich*, 13 Johns. 106; *Padgett v. Lawrence*, 10 Paige at p. 180; *Vrooman v. King*, 36 N. Y. 477.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MARGARET COTTON, Respondent, v. CHRISTINA BURKELMAN,
Appellant.

The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. In an action to compel specific performance of the contract, *held*, that the power of sale was not given for the benefit of the remaindermen simply, but its chief purpose was the benefit and safety of the life tenant; and so, that the power was not extinguished by the death of M. and the deed of the executrix was sufficient to carry the fee.

Sweeney v. Warren (127 N. Y. 434), distinguished.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made January 3, 1893, which reversed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hamilton R. Squier for appellant. The infant cannot be divested of his ownership of these lands under the power in question. (*Hetzel v. Barber*, 69 N. Y. 1; Code Civ. Pro. § 2348; *Horton v. McCoy*, 47 N. Y. 26.) Mary E. Cotton having died prior to the making of the contract the power given to the said Margaret Cotton could not be exercised, and fell. (*Hetzel v. Barber*, 69 N. Y. 11; *Jackson v. Jansen*, 6 Johns. 73; *Sharpstein v. Tallou*, 3 Cow. 651; *Sweeney v. Warren*, 127 N. Y. 426.) The power of sale in the will was not a power coupled with an interest, because it vested in the executrix in her official capacity, and not in her capacity as life tenant — it was not appendant to her life tenancy — and,

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therefore, became void upon the death of Mary E. Cotton. It was not a power to be exercised for the benefit of the executrix. (*Sweeny v. Warren*, 127 N. Y. 426; *Bloomer v. Waldron*, 3 Hill, 362.) The life estate of Margaret Cotton was not enlarged into a fee by reason of the charges imposed upon it, as the mother, Fanny Cotton, has died. (*Nellis v. Nellis*, 99 N. Y. 515.)

Thomas McAdam for respondent. The intention of the testator must control. (*Roome v. Phillips*, 24 N. Y. 468; *French v. Carhart*, 1 id. 96; *Underhill v. Vandervoort*, 56 id. 242; *Bowditch v. Ayrault*, 138 id. 222; *Wood v. Mitcham*, 92 id. 378; *Kelso v. Lorillard*, 85 id. 182; *In re Albertson*, 113 id. 439; *Kinnier v. Rogers*, 42 id. 531; *Skinner v. Quinn*, 43 id. 99; *Hertzell v. Bacher*, 9 Hun, 534.) The power of sale survived. (*Osgood v. Franklin*, 2 Johns. Ch. 1; 14 Johns. 527; *Jackson v. Burtis*, Id. 391; *Dunlap's Paley's Agency* [ed. of 1856], 184; *Story on Agency*, § 477; *Whart. on Agency*, § 105; *Bergen v. Bennett*, 1 Caine's Cas. 15.) Powers coupled with an interest are irrevocable. (*Hunt v. Rousmanier*, 8 Wheat. 174; *Knapp v. Alvord*, 10 Paige, 205; *Marfield v. Douglass*, 1 Sandf. 409.) The power was properly executed. (*White v. Hicks*, 33 N. Y. 383; *Bradstreet v. Clark*, 12 Wend. 602; *Van Wert v. Bradley*, 1 Bradf. 114; *Onderdonk v. Ackerman*, 62 How. Pr. 318.) The court below might have ordered judgment for the plaintiff. (*Marquat v. Marquat*, 12 N. Y. 336; *King v. Barnes*, 109 id. 268, 283; *Beach v. Cook*, 28 id. 509, 538; *King v. Havens*, 25 Wend. 420, 422.)

FINCH, J. This action was brought by the vendor of real estate for a specific performance of a contract of sale, and the defense of the vendee is that the vendor cannot convey a good title to the property. That defense depends entirely upon the construction of the will of German Cotton, who gave to his wife, Margaret, a life estate in the land, with remainder in fee to his adopted daughter, Mary. She married, and has since

died, leaving a son, Edwin Talbot, in whom the remainder in fee has vested. The widow, Margaret, was made sole executrix and the will proceeds thus: "With full power to sell and dispose of all or any part of my real estate or personal securities of which I may die possessed, as in her judgment may seem best, and to invest the proceeds of said sales as she may deem best for the benefit of our adopted daughter, Mary E. Cotton." It is over this power of sale that the controversy arises, for the purchaser contends that the sole purpose of the power was the benefit of the daughter, and she having died the object of the power is no longer attainable and the power itself is forever extinguished, while the vendor contends that the primary object of the power was to benefit the widow as life tenant, and enable her to secure by a sale of the land and an investment of the proceeds, a larger or more reliable income than the land itself would yield, and that such purpose remains and feeds the power although the adopted daughter is dead; and so the deed tendered by the executrix in execution of the power is good and sufficient to carry the fee. The General Term has so held, and we think the conclusion is correct.

The scope of the will leaves no doubt of the testator's intention. He gives all his property to his wife for the term of her natural life, prescribing that it shall be in lieu of dower, and charging upon it specifically the support of his mother. During the life of the widow he makes no provision for the adopted daughter, but assumes that his wife will provide for her as he and she had always done. He contemplates leaving behind him this family of three, and gives his whole property to his wife as the head and responsible manager during her life, to enable her out of the rents and income to provide for herself and for his mother and the adopted daughter. The power to sell his real estate was conferred upon his wife, as executrix, to meet emergencies liable in the future to threaten this purpose and object of his testamentary dispositions. The real estate might cease, from many causes, to furnish the necessary rents or income, and in that event the whole family

would suffer and not merely the wife alone. The very form of the power granted and the words used for its creation, indicate that its chief purpose was the benefit and safety of the life tenant. The testator makes her sole executrix and commits wholly to her judgment the time, mode and terms of sale, and interposes his directions only as it respects the mode of investing the proceeds. That duty is to be done with principal regard to the interests of the daughter as entitled to the estate in remainder. The widow might be tempted by a greater interest to take a weaker security, and so he requires the investment to be such as will best secure the ultimate transfer of the fund to the daughter. The power of sale was not given or intended for the latter's benefit as devisee of the remainder. She was safer if any such authority should be withheld. The obvious purpose was to secure against possible emergencies the income devoted to the support of the widow, and through her that of both mother and daughter. This purpose survived the death of the daughter and was in no manner dependent upon her life, and her death left the power still existent and capable of execution. The cases in this country do not hesitate to apply to powers the leading principle governing the construction of a will which requires us to ascertain and carry out the intention of the testator so far as possible, (*Peter v. Beverly*, 10 Peters, 564), and that intention in the present case seems to me quite clear and certain.

Much was said on the argument as to the grant of the power to the executrix, instead of to her as an individual or as life tenant. It is not necessary to argue the point in view of what this court has already settled. In *Sweeney v. Warren*, (127 N. Y. 434), it was said that "undoubtedly a power may be vested in executors, as such, to be exercised for their own benefit as individuals," and it was added that "when a power is conferred upon executors by virtue of their office, and not on them as individuals, there being no other evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit." The

appellant here relies upon that presumption, but it does not arise because there *is* the evidence referred to that the power was given to the executrix for her own benefit as life tenant. Nothing in the condition of the estate required it; everything in the situation of the widow made it necessary for her possible protection.

We hold, therefore, that the power of sale was not extinguished by the death of the adopted daughter and that the deed of the executrix will convey a good title.

The order of the General Term should be affirmed and judgment absolute ordered for the plaintiff, with costs.

All concur.

Ordered accordingly.

LOUIS RAPPS et al., Respondents, v. HENRY GOTTLIEB et al.,
Defendants; BETTIE STERN, Appellant.

An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee.

Where, therefore, a bond and mortgage was executed and delivered to G. upon the express understanding that he should advance thereon a sum specified, and that until the advance was made they were to be "invalid, void and no effect," and G. made no advance, but assigned the instruments to S., who took in good faith and for value, *held*, that the mortgage was invalid in the hands of the assignee; and that an action was maintainable to have the same canceled as a cloud on plaintiffs' title.

The distinction pointed out between such a case and one relating to the transfer of conceded existing legal rights, wherein questions arise as to equities, not between the original parties, but between subsequent holders; as in the cases of *McNeil v. Tenth Nat. Bank* (46 N. Y. 825); *Moore v. Met. Bank* (55 id. 41).

The rule that where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done, applies only in an emergency; it is a rule of last resort, applicable only where all others fail.

Reported below, 67 Hun, 115.

(Submitted March 19, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

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142	164
160	51
160	60

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made February 13, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought to have canceled as a cloud upon title and satisfied of record a bond and mortgage executed by the plaintiffs to the defendant Henry Gottlieb, and assigned by him to the defendant Bettie Stern.

The facts, so far as material, are stated in the opinion.

Alfred Steckler for appellant. It is undoubtedly well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. This case is an exception to the rule. Here the plaintiffs, by their own act, put it in the power of the wrongdoer to commit the wrong; and, where one of the innocent persons should suffer, he that put it in the power to do the wrong should suffer alone. The plaintiffs, by their own affirmative act, in executing and delivering the mortgage to Gottlieb, conferred the title and absolute ownership of said bond and mortgage upon Gottlieb, and they are estopped from disputing the same. (*McNeil v. T. N. Bank*, 46 N. Y. 329; *Zoellen v. Riley*, 100 id. 102; *Parker v. Enner*, 93 id. 119; *Wood v. Chapin*, 13 id. 509; *Simpson v. Del Hoyo*, 94 id. 194.) The mortgage executed by the plaintiffs to Gottlieb recites the fact that they are justly indebted to him in the sum of \$1,000. The bond executed by the plaintiffs to Gottlieb recites the fact that they are bound to pay to him the sum of \$1,000. The plaintiffs are, therefore, estopped from disputing the truthfulness of these recitals, and are bound thereby as against an innocent holder for value. A recital of the receipt of the consideration or admission of indebtedness is binding as against an innocent purchaser. (72 Ala. 632; 100 Ind. 558; 130 Mass. 289; 27 Penn. St. 151; 35 id. 523; 78 Am. Dec. 354; *Moore v. M. Bank*, 55 N. Y. 41.) Even if Gottlieb procured the mortgage by fraud, he could give good title to an innocent purchaser for value. (*Zink v. People*, 77 N. Y. 121; *Root v. French*, 13 Wend. 570; *Page v. Kilker*, 137 N. Y. 307.)

Jacob Manheim for respondents. The court was right in its conclusion of law that a bond and mortgage without consideration, and void and without legal inception in the hands of the obligee and mortgagee mentioned in said bond and mortgage, are also void in the hands of any subsequent assignee of said bond and mortgage, though such assignee received said assignment in good faith and for value. (*Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Green v. Fry*, 93 id. 253; *Kursheedt v. McCune*, 8 N. Y. S. R. 440; *Ingraham v. Disborough*, 47 N. Y. 421; *Crane v. Turner*, 67 id. 437; *Hill v. Hoole*, 116 id. 299; *Westfall v. Jones*, 23 Barb. 9; *Bennett v. Bates*, 94 N. Y. 354; *Shaffer v. Reilly*, 50 id. 61; *Davis v. Bechstein*, 69 id. 440; *Briggs v. Langford*, 107 id. 680.)

FINCH, J. We must assume in this case that the mortgage which the plaintiffs seek to cancel as a cloud upon their title never had a valid inception, and failed to become a subsisting security. The finding is that the bond and mortgage, after having been duly executed, were delivered to one Gottlieb "upon the express understanding" that he should advance nine hundred and twenty-five dollars as the consideration, and that until such advance was made the "bond and mortgage were to be invalid, void and of no effect." In other words, there was only a conditional delivery of the security, depending for its validity upon the advance of the money, and so the creation of a debt which the bond and mortgage could secure. Gottlieb never advanced the money, but, availing himself of his possession of the instruments, assigned them to the defendant Bettie Stern, who took them in good faith and for value. Relying upon that fact, she now claims to be protected in her ownership, and to hold and enforce the securities against the mortgagor. She has been defeated and required to deliver up and cancel the instruments as being without consideration and void, and appeals from that decision.

The rule is conceded that the assignee of the mortgage takes subject to the equities between the original parties, and has

no greater rights than the original mortgagee. The mortgage, therefore, was invalid in the hands of the assignee, because her assignor could not enforce it against the mortgagor. But while conceding this rule, the appellant claims that there are exceptions to it, and cites the cases in which the owner of property has negligently, or from over-confidence, clothed another with its apparent ownership and with seeming authority for its transfer, and in which, by estoppel or otherwise, the innocent assignee for value has been protected. Obviously, such an exception applied to this case would annihilate the rule, for in all cases of the assignment of a mortgage invalid between the original parties its existence when it ought not to have existed indicates the negligence or over-confidence referred to as the basis of the exception. None of those cases relate to the transfer of a mortgage, which is but a security or lien and enforceable only in equity, but all of them were instances in which the assignor had the legal title and the means of transferring it in the most effectual manner. They related to the transfer of a conceded existing legal right, and respected the equities, not between the original parties, but between subsequent holders dealing in one way or another with the valid securities. The appellant's chief reliance is upon *McNeil v. Tenth Nat. Bank*, (46 N. Y. 325), and *Moore v. Metropolitan Bank*, (55 id. 41). In neither case was there any question between the original parties. In the one the plaintiffs owned certain shares of bank stock by a title perfectly valid as between them and the corporation of issue, and without any existing equities in favor of the latter. That stock the plaintiffs pledged and the pledgees made a further transfer to the defendant bank and all the questions arose, not between the original parties to the stock obligation, but between the subsequent holders. In *Moore v. Metropolitan Bank* the plaintiff held a certificate of indebtedness issued by the capitol commissioners. There was no question of its validity or of any equity in behalf of the state, but the whole quarrel was among the transferees, and respecting their dealings with a security concededly valid as between the original parties. It was argued in that case that protection to the

assignee as a holder in good faith and for value would make all non-negotiable securities at once negotiable, to which the court retorted: "Not so. No one pretends but that the purchaser will take the former subject to all defenses valid as to the original parties." These cases, therefore, in no manner infringe or work exceptions to the uniform rule that the assignee of a mortgage has no greater right against the mortgagor than belonged to the original mortgagee.

A further argument is made founded upon the doctrine that where one of two innocent parties must suffer from a wrong he must bear the loss whose action enabled the wrong to be done; but that doctrine applies only in an emergency. It solves problems which have no other solution; it supplies a ground of decision where all others are absent; it operates as a reason when nothing else can master the situation; it is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself. Any wider view of it would make it a disturbing force, tending to unsettle and destroy the most firmly fixed doctrines of the law. It is good and useful—in its place—but will always make trouble if not kept where it belongs. Applied to this case it would, as I have already suggested, destroy the doctrine which we have long and steadily held, that the assignee of a mortgage takes no greater right than belonged to the original mortgagee, for the apparent mortgagor who does not owe the debt and the assignee who has parted with his money may each be innocent and one must suffer, and that one would be the party who signed the mortgage and set in motion the sequence of results. If it is always remembered that the doctrine as to innocence on both sides operates only when other solutions are not available, or possibly in aid of proper solutions, very much of needless confusion will be avoided.

I think, therefore, that the decision below was right and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ERASTUS K. BURNHAM, Respondent, v. CAPE VINCENT SEED
COMPANY, Limited, Appellant.

C. shipped a cargo of peas from Kingston, Canada, to Cape Vincent, consigned to a Kingston bank, care of plaintiff, a warehouseman at Cape Vincent. Plaintiff received the cargo and delivered to C. a warehouse receipt stating that the peas were held subject to the order of the consignee. C. drew a draft against the consignment on defendant, which was duly accepted by it under an agreement that it was to have possession of the cargo on payment of the draft, the warehouse receipt to be held meanwhile as security. The draft with the warehouse receipt attached as security, was discounted by said bank. Defendant, after acceptance and before maturity of the draft, took the cargo from plaintiff's possession without his permission. Defendant having failed to pay the draft, plaintiff paid it, on demand being made by the bank for the cargo, and thereupon the draft with the warehouse receipt was duly transferred to him. *Held*, that plaintiff was entitled to recover of defendant the amount of the draft; that the provisions of the Penal Code (§ 639) forbidding a warehouseman from delivering to another than the holder of a warehouse receipt issued by him, the property covered by it, did not apply.

(Argued March 21, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought, among other things, to recover the amount of a draft drawn by F. F. Cole and accepted by defendant in payment for a cargo of peas, which was paid by plaintiff and transferred to him by the Ontario Bank, on which it was drawn.

The facts, so far as material, are stated in the opinion.

E. C. Emerson for appellant. The uncontradicted evidence showed that if the peas were received by defendant the delivery was contrary to the provisions of section 663 of the Penal Code. (*F. & M. Bank v. Logan*, 74 N. Y. 568; *Whitlock*

v. *Hay*, 58 id. 484; *Colgate v. P. Co.*, 102 id. 120; *C. Bank v. R., W. & O. R. R. Co.*, 44 id. 136, 141; *F. N. Bank v. Kelly*, 57 id. 34; Penal Code, §§ 629, 631, 632.) The plaintiff was not entitled to recover upon the first cause of action in his complaint. (*Bell v. Quinn*, 2 Sandf. 146; *Smith v. City of Albany*, 7 Lans. 14; *Foley v. Spies*, 100 N. Y. 552, 558; *Bettinger v. Bridenbecker*, 63 Barb. 396; *Dung v. Parker*, 10 N. Y. 294; *Hewitt v. Brisbane*, 16 id. 508.) The transaction between plaintiff and Cole under which the plaintiff claims, amounted to an agreement not to prosecute the plaintiff criminally in consideration of a settlement. This of itself would defeat the plaintiff's first cause of action, as it is an elementary rule of law that all contracts, the object of which are to compound felonies, suppress evidence or stifle prosecutions, are void. (*Conderman v. Hicks*, 3 Lans. 108, 111, 112; *Bank v. Matthewson*, 5 Hill, 249; *Porter v. Haven*, 37 Barb. 343; *Nickelson v. Wilson*, 60 N. Y. 368; *Bettinger v. Bridenbecker*, 63 Barb. 396.) The proofs showed a full payment of this claim. At least it was an executed accord and satisfaction which barred further recovery. (*Palmerton v. Huxford*, 4 Den. 166; *Veilder v. Vedder*, 1 id. 257; *People v. Board of Managers*, 96 N. Y. 640; *Morehouse v. S. N. Bank*, 98 id. 504; *Allison v. Abendroth*, 108 id. 470-472; *Kromer v. Heim*, 75 id. 574-577.) The court erred in refusing to charge that plaintiff could not recover unless he showed a delivery of the peas. (Edwards on Bills, 431.) The receipt in evidence of a telegram from Howard to Cole offering to pay \$1,000 on the draft was error. (*O. S. Co. v. Otis*, 14 Abb. [N. C.] 388.)

N. F. Breen for respondent. Upon the conceded fact of the acceptance of the draft and the jury finding the fact that the defendant received the peas, the defendant was liable to the holder of the draft, though the defendant illegally got the peas and this cause of action was assigned to the plaintiff. (*Bank of Rochester v. Jones*, 4 N. Y. 497; *C. Bank v. Pfeffer*, 108 id. 242; *F. C. N. Bank v. Garfield*, 30 Hun,

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579.) The exception as to the receipt in evidence of the telegram is untenable. (Whart. on Ev. § 76; *Morgan v. People*, 59 Ill. 58.)

BARTLETT, J. This is an appeal from a judgment affirming a judgment in favor of plaintiff on the verdict of a jury at Jefferson County circuit, and from an order denying a new trial. The plaintiff was a warehouseman residing at Cape Vincent in this state. On the 2d of October, 1890, one Cole, a seed dealer at Kingston, Ontario, shipped from that port to Cape Vincent, by steamer "Khartoum," a cargo of peas consigned to the Ontario Bank of Kingston, care of plaintiff. On the 3rd of October, 1890, said cargo arrived in Cape Vincent and was deposited in plaintiff's elevator, and a warehouse receipt was issued and delivered to Cole stating that the peas were held subject to the order of the Ontario Bank of Kingston. Cole thereupon drew a ninety days' draft against this consignment on defendant, which was duly accepted Oct. 13, 1890, the defendant to have possession of said cargo on payment of the draft, the warehouse receipt to be held as security meanwhile. Cole then attached the warehouse receipt to the draft and procured discount by the Ontario Bank. The defendant failing to pay the draft when due, the Ontario Bank demanded of plaintiff the cargo of peas held by him as security for its payment. The plaintiff claimed that the defendant, after accepting the draft, had, without authority, taken possession of the cargo of peas; he, therefore, paid the draft, and thereupon it was duly transferred to him by the Ontario Bank, together with the warehouse receipt. The plaintiff then brought this action, setting up in his complaint three causes of action, viz.: first, on the draft so paid; second, for value of certain peas received by defendant and never accounted for, but no part of cargo in question; third, for storage of the cargo of peas involved in the first cause of action. The main contest was over the first cause of action. The defendant denied that it had received any portion of the cargo of peas stored as security for the payment of the draft;

also alleged that plaintiff had parted with the custody of said cargo in violation of section 633 of the Penal Code which forbids warehousemen to deliver to another property covered by a receipt, and for that reason could not maintain this action. The question of fact as to whether the defendant had taken from the custody of the plaintiff, without his permission, and before the maturity of the draft, the cargo of peas held as security for its payment, was properly submitted to the jury, and their verdict in favor of plaintiff is conclusive.

The defense based on plaintiff's alleged violation of section 633 of the Penal Code has no foundation in fact or in law. The section referred to is designed to protect the *bona fide* holders of negotiable warehouse receipts by inflicting a severe penalty on warehousemen who wrongfully deliver to third parties property covered by the receipts. In the case at bar, the plaintiff held the cargo of peas as security for the Ontario Bank, and if, before the bank's debt was paid, he had wrongfully delivered it to the defendant, he would have been criminally liable under section 633 of the Penal Code, and the bank could have proceeded against him in a civil action for damages. (*Colgate v. The Pennsylvania Co.*, 102 N. Y. 120; *First National Bank of Cincinnati v. Kelly*, 57 id. 34.) The facts in this case show that the section quoted has no application. The plaintiff before this action was commenced had paid the claim of the Ontario Bank and was subrogated to all its rights as against the defendant; his cause of action was on the draft although inartificially pleaded; the defendant, by the verdict of the jury, is found to have received the cargo of peas which was covered by the warehouse receipt held by the bank, and there is no reason, in morals or in law, why it should not pay the draft accepted in payment for property it has reduced to possession. As to the second and third causes of action it is unnecessary to discuss them in detail; it is sufficient to say that the verdict of the jury is warranted by the evidence. The judgment must, therefore, be affirmed unless the exceptions in the case disclose errors of law calling for reversal.

The defendant's counsel took a large number of exceptions to the charge of the trial judge and to his refusals to charge as requested, but they are disposed of by the view we take of this case on the merits. There were numerous exceptions taken during the trial, all of which have been examined. We are of opinion that none of them requires special comment unless it be the exception to receiving in evidence a certain telegram sent by defendant's vice-president, J. H. Howard, to Cole, the consignor of the cargo of peas in question. The objection was made that this telegram was not sufficiently proved to entitle it to be read. Assuming the telegram to have been improperly received, it worked no prejudice to the defendant, as its counsel had previously introduced in evidence a letter from Howard to Cole dated the day after the telegram and referring to it, and repeating an offer therein contained of partial payment on the amount due Cole from the defendant for said cargo of peas.

The judgment and order appealed from are affirmed, with costs.

All concur, except O'BRIEN, J., not voting.

Judgment accordingly.

EDWIN BEARDSLEY et al., Respondents, v. THE LEHIGH VALLEY RAILWAY COMPANY, Appellant.

An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track of the road, does not deprive the owner of his right to compel the railroad company to construct suitable crossings. It is to be assumed that both parties stood upon their legal rights as to crossings, and they are in no manner extinguished or affected by the award.

Accordingly *held*, that an award in such proceedings, in the absence of evidence showing that the damages awarded rested to any extent upon the form or manner of constructing the crossings, was no defense to an action brought to compel defendant to construct an underground crossing.

Reported below, 65 Hun, 502.

(Argued March 20, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. P. Rose for appellant. The plaintiffs should not have the relief prayed for because damages for this identical cause of action have already been awarded and paid them in the proceedings to condemn the land. (*Embury v. Conner*, 3 N. Y. 511; *Clemens v. Clemens*, 37 id. 59.) Our exceptions to the admission of evidence as to the difference in value of the farm with and without an undercrossing are well taken. (*Roberts v. N. Y. E. R. R. Co.*, 128 N. Y. 455; *Avery v. N. Y. C. & H. R. R. Co.*, 121 id. 31.)

James C. Smith for respondents. The duty imposed by section 44 of chapter 140 of the Laws of 1850, upon every railroad corporation formed under that act, to construct farm crossings for the use of the proprietors of lands adjoining its railroad, may be enforced by a court of equity, in an action brought to compel its specific performance, and in such action the court has power to require that the crossing be under and not over the track of the railroad. (*Wheeler v. R. & S. R. R. Co.*, 12 Barb. 227; *Wademan v. A. & S. R. R. Co.*, 51 N. Y. 568; *Jones v. Seligman*, 16 Hun, 230; 81 N. Y. 190; *Post v. W. S. & B. R. Co.*, 123 id. 580, 591; *B. C. Co. v. D., L. & W. R. R. Co.*, 130 id. 152.) In the performance of such duty, a railroad corporation is not vested with an absolute discretion as to the number, location or character of the crossings. The duty must be performed in a proper manner, having due regard to the necessities and the convenience of the owner of the land. (*Jones v. Seligman*, 16 Hun, 231; 81 N. Y. 190; *Wademan v. A. & S. R. R. Co.*, 51 id. 568.) The necessity and propriety of the under-grade

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crossings asked for by the plaintiffs was a question of fact for the decision of the judge upon the trial, in view of the surroundings and all the circumstances, and his decision of that question, upon conflicting testimony, is to be regarded as conclusive. (130 N. Y. 152.) The award and payment of damages in the proceedings had to condemn the land taken by the defendant do not preclude the plaintiffs from maintaining this action to compel the construction of suitable crossings. (*Smith v. N. Y. & O. M. R. R. Co.*, 63 N. Y. 58; *Jones v. Seligman*, 81 id. 190, 197, 198; *Bailey v. B., N. Y. & P. R. Co.*, 25 Hun, 64.)

FINCH, J. Two questions of law are raised in this case. The action is in equity to compel the defendant company to construct an under-grade crossing on the plaintiff's farm. One of the reasons now given for such a crossing is that there may be in that manner provided a safe and convenient passage for cattle to reach water which would be much more inconvenient and unsafe if the only crossings were at grade. The defendant answered that such inconvenience had already been allowed and paid for by the award in condemnation proceedings, and some of the evidence at that time given was recited as proof of the fact. There was testimony that the line of the railroad would leave the adequate and reliable supply of water wholly on one side of the track and the resulting inconvenience was taken into account. But the award was necessarily made upon the assumption that proper and suitable crossings would be made by the company, and the damages given are not shown to have rested to any extent upon the form or manner of constructing the crossings. Witnesses may have given their opinions on the supposition that the crossings would be at grade, but they did not say so, and it does not appear that they excluded from their minds the possibility of an under-crossing, or that their estimates of the general damage to the farm would have been less if they had taken that possibility into account. The defendant promised nothing of the kind, and did not reduce or seek to reduce the damages by agreeing

to give such a crossing. Both parties must be assumed to have stood upon their legal rights as to suitable crossings, and those rights survived the award and were in no manner extinguished or affected by it. That doctrine was substantially held in *Jones v. Seligman* (81 N. Y. 190).

The second objection arises upon defendant's exceptions to the admission of opinions showing the difference in value of the farm with or without the under-crossing, and recent decisions of ours are cited as authority. (*Roberts v. N. Y. Elevated R. R. Co.*, 128 N. Y. 455; *Avery v. N. Y. C. & H. R. R. R. Co.*, 121 id. 31.) No such specific objection was interposed to the evidence. (*Mitchell v. Met. Elevated R. Co.*, 132 N. Y. 552.) And since no judgment for damages was given, the opinions bore only upon the general question involved, and were not vicious in the sense of determining the identical questions of fact submitted for a decision.

Neither ground of appeal warrants a reversal.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

**SIDNEY B. ROBY, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

The interest which a railroad company acquires in land condemned for the use of its road is a permanent easement, and while it exists the company is entitled to the exclusive use, possession and control of the land. While the easement may be abandoned, and the owner of the fee again become entitled to the possession, this must be done by unequivocal acts showing clearly such to be the intent, or by a non-user continued for a long time.

The mere use of the easement for a purpose not authorized, its excessive use or misuse, or a temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment.

A railroad company to whose rights defendant has succeeded acquired by condemnation proceedings the use of a strip of land, and tracks were laid thereon. In an action by plaintiff, who has succeeded to the rights of the original owner, to recover possession, these facts appeared: In 1889 defendant leased the land to Y. for a term of fifteen years. The lease provided that the land was only to be used for a coal yard and

trestle for receiving and handling coal transported over defendant's road. A right was reserved to terminate the lease at any time upon giving six months' notice, and defendant reserved "the use and control of the said track and trestle for all the purposes of a railroad, together with the strip of land." Y. went into possession, built the trestle with coal bins, beneath, and since then has had the exclusive use and control of the land for his coal business, and no one else except defendant's agents and employees, and persons having business with Y. could have access thereto. The only use defendant thereafter made of the land and track was to deliver coal to Y. *Held*, the evidence failed to show an abandonment and consequent loss of defendant's easement; and so, that a verdict and judgment in favor of plaintiffs were error.

Also, *held*, that a modification of the judgment, so as to make it subject to the proper easement of defendant, instead of a reversal, was not proper, as Y. was not a party and had not been heard.

Roby v. N. Y. C. & H. R. R. R. Co. (65 Hun, 532), reversed.

(Argued March 22, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of October, 1892, which denied a motion for a new trial and ordered judgment in favor of plaintiff upon a verdict directed on trial at Circuit.

This was an action of ejectment.

Prior to July 13, 1835, the Tonawanda Railroad Company acquired by condemnation proceedings for the use and accommodation of its railroad the land, being twenty-five feet in width, now in question. The defendant has succeeded to the rights of that railroad company, and the plaintiff has succeeded to the rights of the original owner of the land, subject to whatever rights therein belong to the defendant. The plaintiff brought this action to recover possession of the land, alleging in his complaint, among other things, that "the said New York Central and Hudson River Railroad Company had abandoned the use of the tracks laid across plaintiff's premises and had ceased to use said tracks for railroad purposes; that the use of said tracks is not necessary for the purposes of said railroad, and that they are of no public use whatever, and for some time past the tracks of said railroad company have been used only and exclusively for private pur-

poses; that the said tracks are an obstruction upon plaintiff's premises and the defendant continues to remain unlawfully in possession of said premises." The defendant in its answer to the complaint simply put in issue the allegations thereof quoted. Upon the trial of the action at the close of the evidence the trial judge decided that the plaintiff had title in fee to the land described in the complaint, and that he was entitled to the possession thereof, and he directed a verdict in his favor. The judgment upon that verdict having been affirmed the defendant has appealed to this court.

Albert H. Harris for appellant. Even if the defendant had leased this track to Mr. Yates there would have been no abandonment. (*Miner v. N. Y. C. & H. R. R. R. Co.*, 123 N. Y. 242; *Hooper v. Burne*, L. R. [2 Q. B. Div.] 339; *Mulliner v. M. R. Co.*, L. R. [11 Ch. Div.] 611; *Lewis on Em. Dom.* §§ 588, 597; *C. C. R. R. Co. v. McCaskill*, 94 N. C. 746; *Curran v. Louisville*, 83 Ky. 628; *Dyer v. Sanford*, 50 Mass. 395; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Strong v. City of Brooklyn*, 68 id. 1; *Columbus v. R. R. Co.*, 37 Ind. 294; *Hamilton v. R. R. Co.*, 1 Md. Ch. 553.) The plaintiff has no right to the possession of any part of the property. (*Munger v. T. R. R. Co.*, 4 N. Y. 357; *R. R. Co. v. Gieve*, 17 Minn. 322; *Jackson v. R. R. Co.*, 25 Vt. 150; *R. R. Co. v. Holton*, 32 id. 43; *R. R. Co. v. Potter*, 42 id. 265; *Brainard v. Clapp*, 10 Cush. 6.) If the plaintiff is entitled to recover, he is only entitled to judgment for the possession of the land subject to the easement of the defendant for railroad purposes. (*Locks v. N. & L. R. R. Co.*, 104 Mass. 1.)

William F. Cogswell for respondent. Where only an easement is taken for the public use, if that use is abandoned the land reverts to the original proprietor, or rather the land is relieved of the burden cast upon it, and the owner is restored to his complete dominion of property. (*Mahon v. N. Y. C. R. R. Co.*, 24 N. Y. 658, 660.) When a railroad company acquired under the statute merely the right of using for the

public purpose of a railroad, segregated from its line a portion of its track by leasing it to private individuals for private purposes, housed it within a structure that excluded everybody else therefrom, put the same under lock and key and gave it to an individual, and gave that individual exclusive control over it, so much of the track thus used was no longer used for a public purpose. (*Proprietors of Locks & Canals v. N. & L. R. R. Co.*, 104 Mass. 11; *Mahon v. N. Y. C. R. R. Co.*, 24 N. Y. 658; 1 Wood on Railways, 716, 717.)

EARL, J. The strip of land in question was near the easterly terminus of the Tonawanda railroad, and since its acquisition for railroad purposes a track has been maintained thereon which has connection with the main track of the defendant's railroad. In April, 1889, the defendant and Arthur G. Yates of the city of Rochester, entered into an agreement whereby the defendant made a lease to Yates covering the land in question and other lands in the same vicinity for a term of fifteen years from the first day of May, 1889, at an annual rental payable quarterly. It was provided in the agreement that the land covered by the lease was to be used only for a coal yard and trestles for the purpose of receiving and handling coal transported over the railroad of the defendant. It reserved the right to terminate the lease at any time upon giving six months written notice; and Yates covenanted not to assign the lease or underlet the premises or any portion thereof. It agreed to furnish the ties and iron rails necessary for the use of the trestle and lay the tracks and keep them in repair, and he agreed to make all repairs in and about the trestle at his own expense, and to furnish the materials to construct the same, and at all times during the continuance of the lease to keep the same in good repair and condition for use. It reserved from the lease "the use and control of the said track and trestle for all the purposes of a railroad, together with the strip of land twenty-five (25) feet in width adjoining the Erie canal, acquired for the purposes of said railroad."

It appears that under this agreement Yates went into possession of the land, built the trestle thereon by raising the tracks, built a shed over the tracks inclosing the tracks and trestle, and made coal bins or pockets beneath the same; that he had the sole and exclusive use of the land and trestle for his coal business; that no one else except the defendant and its agents and employees and persons having business with Yates could have any access to the track and the land, and that the only use the defendant made of the land and the track thereon was for the delivery of coal to Yates. Substantially upon this evidence the court below held that the defendant had abandoned the use of this strip of land for the purposes of its railroad; that the land had, therefore, reverted to the plaintiff, and that he was entitled to recover the same in this action.

The interest of the defendant in this strip of land was a permanent easement for the uses and purposes of its railroad. (*Heard v. City of Brooklyn*, 60 N. Y. 242; *Miner v. N. Y. C. & H. R. R. R. Co.*, 123 id. 242; *Weston v. Foster*, 7 Met. 297; *Proprietors of Locks, etc., v. N. & L. Railroad Co.*, 104 Mass. 1.) While this easement exists the defendant is entitled to the exclusive use, possession and control of the land, and the owner of the fee has no right to use, occupy or interfere with the same in any manner whatever. Under the general laws of the state railroad corporations are bound to keep their tracks guarded and protected by fences and cattle guards, and there is no right of crossing by the owners of adjoining property except at farm crossings, to be built for the use of adjoining farm owners. While it has been held in some cases that the owner of the fee, subject to the railroad easement, has some right to use the land taken, not inconsistent with the easement, the better view of the law, supported by the greater weight of authority, is that the use of the railroad company while the easement exists is exclusive of the owner of the fee. (*Pierce on Railroads*, 159, 160, and cases cited; *Mills on Eminent Domain*, § 208; *Hazen v. B. & M. Railroad Company*, 2 Gray, 574; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349.)

We think the evidence does not show that the defendant had

abandoned this strip of land, or its easement therein, so that the owner of the fee became entitled to the possession thereof.

An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere non-user, if continued for a long time. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. (Washburn on Easements, 2d ed. 631, *et seq.* and cases cited; *Hoggatt v. Railroad Company*, 34 Ia. An. 624; *Curran v. City of Louisville*, 83 Ken. 628; *Proprietors of Locks, etc., v. N. & L. R. R. Co.*, 104 Mass. 1; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Crain v. Fox*, 16 Barb. 184; *Snell v. Levitt*, 110 N. Y. 595.) Under these authorities the acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by some act of the owner thereof, or some other unequivocal act showing an intention to permanently abandon and give up the easement. Here there were absolutely no acts of the kind mentioned. The defendant could put an end to the lease to Yates at any time by giving the six months notice. It continued to use the track passing over the land in question for railroad purposes, to wit, the transportation of coal to Yates, and it actually reserved the use and control of the track and land for all railroad purposes. I can assert with great confidence, after a diligent examination of the books, that no authority can be found holding that upon such facts an easement has been absolutely lost to the owner thereof.

The court below, therefore, erred in ordering judgment for the plaintiff, absolutely taking this land from the defendant.

But the learned counsel for the plaintiff asks that instead of reversing the judgment we modify it so as to give judgment to the plaintiff, subject to the proper easement of the defendant. This we ought not to do. The action was commenced, tried and decided solely on the ground that the defendant had forfeited its rights in the land in question. Yates is not a

party to the action, and he has not been heard. We ought not to pass upon his rights under his lease without hearing him. Upon the plaintiff's theory of his rights, Yates is a necessary party to this action, and before the new trial he should be made a party. (Code, §§ 1502, 1503.) The case of *Proprietors of Locks, etc., v. N. & L. R. R. Co.* (*supra*) is not an authority for the modification asked, although such a judgment as the plaintiff now wants by the modification was there given. There, the lessees, as I infer, were actually represented in the litigation. The facts were all agreed upon without reference to the pleadings or the parties. There it was stipulated that if "the demandants have any cause of action against the railroad corporation or their lessees, or either of them, such judgment is to be rendered in this action against the tenants as the demandants would be entitled to recover upon the facts, in any form of action against the tenants or either of their lessees."

Besides, we are not now, upon the evidence appearing in this record, prepared to pass upon the rights of Yates under his lease and the power of the defendant to use this land substantially as it now uses it. The matter is not free from doubt, and we leave it to be determined upon fuller argument and a more careful presentation of the facts when the proper parties are in court, simply calling attention to the following authorities, in addition to those above cited; *Morawetz on Corporations*, § 190; *People ex rel. Fairchild v. Preston* (140 N. Y. 549); *W. U. Tel. Co. v. Rich* (19 Kansas, 517); *Illinois Cent. R. R. Co. v. Wathen* (17 Ill. App. 582); *Grand Trunk R. R. Co. v. Richardson* (91 U. S. 454); *Carolina Cent. R. R. Co. v. McCaskill* (94 N. C. 746); *Peirce v. B. & L. R. R. Co.* (141 Mass. 481); *Hooper v. Bourne* (2 Q. B. Div. 339); *Mulliner v. Midland R. Co.* (11 Ch. Div. 611); *Reformed Church v. Schoolcraft* (65 N. Y. 134); *In re N. Y. C., etc., R. R. Co. v. M. G. L. Co.* (63 id. 326); *Strong v. City of Brooklyn* (68 id. 1); *In re N. Y. C., etc., R. R. Co.* (77 id. 248); *In re the Application of the Staten Island Rapid Transit Company to Acquire Lands* (103 id. 251).

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Statement of case.

Our conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except FINCH, J., not sitting.

Judgment reversed.

WILLIAM N. DICKINSON, Respondent, v. JAMES H. HART,
Appellant.

Defendant, being the owner of a store in which he carried on the jewelry business, entered into an agreement with plaintiff, who was engaged in the stationery business, by which the former agreed to furnish for the use of the latter, one show case and suitable shelving in the store "for the purpose of conducting a stationery business," for the term of five years, plaintiff to pay therefor a percentage on the gross amount of his sales. Plaintiff entered the store and carried on the stationery business therein for two years, when defendant removed to a new store, taking away the show case and shelving he had furnished for plaintiff's use, furnishing him no others in their place; he also rented the store, one-half for a second-hand clothing business, the other half for a dyeing establishment. In an action to recover damages, *held*, that the agreement contemplated that the stationery business should become a department in defendant's store; that he could not, after plaintiff had entered upon that business, so change the character of the business carried on, and the arrangements of the store, as to make it unfit and unsuitable for plaintiff's business, and so destroy it; that the facts justified a finding that defendant, by his acts, had ousted plaintiff, broken up his business and violated his agreement; also, that the agreement did not create the relation of landlord and tenant, and so the rule of damages proper, where that relation exists, did not apply; but that plaintiff was entitled to recover the value of the agreement to him at the time of the breach. Plaintiff proved the gross amount of his sales for the two years he carried on the business, the amount of his net profits, also the income he was able to make elsewhere during the succeeding year, and what he was able to earn after his business in defendant's store was broken up. *Held*, the evidence furnished a sufficient basis for an award of damages.

(Argued March 14, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor

of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for alleged breach of a contract.

Plaintiff, who was engaged in the stationery business, on April 6, 1887, entered into an agreement with defendant, who was a jeweller and occupied a store in the city of Brooklyn, which is set forth in the complaint. Plaintiff moved his business into the store and carried it on pursuant to the agreement for two years, when defendant moved his business to another store, taking away the shelving and the show cases, including that furnished for plaintiff's use. He let one-half of the store to a dyeing establishment, and the other half to a second-hand clothier, which would necessitate the putting of a partition through the center of the store. No show case or shelving were afterwards offered plaintiff by defendant. Plaintiff left the store and engaged in business elsewhere. A verdict for \$3,000 was rendered in his favor.

The further material facts are stated in the opinion.

James Troy for appellant. Upon the principle that a plaintiff cannot recover for an avoidable damage, if it was true that he had been deprived of the show case and shelving, he could have re-placed them at a trifling cost, which would have constituted his whole damage and have thereby avoided all injury to his business. (3 Sedg. on Dam. [8th ed.] 295, §§ 201, 215; *Sparks v. Bassett*, 17 J. & S. 270; *Meyers v. Burns*, 35 N. Y. 269; *Hester v. Knox*, 63 id. 561; *Cooke v. Soule*, 56 id. 420; *Wright v. Bank Metropolitan*, 110 id. 237; *Parsons v. Sutton*, 66 id. 92; *Dillon v. Anderson*, 43 id. 231; *Hamilton v. McPherson*, 28 id. 72.) The court erred in permitting plaintiff to state his purpose in removing plates in April. (*Windmuller v. Pope*, 107 N. Y. 674.) The measure of damages is simply the value of the lease, to which may be added the loss occasioned by an injury to property by the act of removal — to be recoverable, profits must be the direct and immediate fruit of the contract and must be independent

of any collateral engagement or enterprise entered into in expectation of the performance of the principal contract. (*Kelly v. Miles*, 35 N. Y. S. R. 73; *Hyman v. B. C. M. Co.*, 36 id. 927; *Taylor on Landl. & Ten.* [7th ed.] § 317; *Williams v. Bonnell*, 1 M., G. & S. 402; *Mack v. Patchen*, 42 N. Y. 167; *McAdam on Landl. & Ten.* 498; *Noys v. Anderson*, 1 Duer, 342; *Shaw v. Hoffman*, 25 Mich. 163; *Bernstein v. Much*, 130 N. Y. 354; *Friedlander v. Myers*, 139 id. 432; *Dennison v. Ford*, 10 Daly, 415.)

Chas. J. Patterson for respondent. The rule of damages adopted by the court was correct. The plaintiff was entitled to recover the value of the privilege or right which the contract gave him; that is what such a privilege was worth on May 2, 1889, subject to the conditions of the agreement and under all the contingencies that were liable to affect the result. (*Bagley v. Smith*, 10 N. Y. 489; *Taylor v. Bradley*, 4 Abb. Ct. App. Dec. 363; 39 N. Y. 129; *Wakeman v. W. & W. S. M. Co.*, 101 id. 205; 9 Bing. 68; *Hexter v. Knox*, 63 N. Y. 561; *Juques v. Millar*, L. R. [6 Ch. Div.] 153; *Chapman v. Kirby*, 49 Ill. 211.) In order to estimate the value of the privilege which the plaintiff had, to carry on the business for three years from May, 1889, the jury were entitled to calculate and consider the profits which he would have made if his rights were observed, and upon the issue as to what those profits would be the plaintiff had the right to prove the past profits for the two years during which the business had been conducted. (*Schile v. Brockhaus*, 80 N. Y. 614; *Bagley v. Smith*, 10 id. 498; *Oue v. Wiener*, 40 Md. 15; *Goodsell v. W. U. T. Co.*, 21 J. & S. 46; *In re Adams*, 15 Abb. [N. C.] 6; *Chapman v. Kirby*, 49 Ill. 211.) The court correctly charged the jury that the defendant could not substantially change the character of the store, nor put in any business which would render it impossible for plaintiff to carry on his business successfully. (*Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Russell v. Allerton*,

108 id. 288; *Jones v. Kent*, 82 id. 585; *Booth v. C. Co.*, 74 id. 15; *Coleman v. Beach*, 97 id. 545.)

EARL, J. At the time of making the agreement hereinafter set out, the plaintiff had had large experience in the stationery business, and the defendant was the owner of a store on Fulton street, in the city of Brooklyn, in which he carried on the jewelry business. The agreement is as follows:

“BROOKLYN, KINGS Co., *April 6, 1887.*

“This agreement made this day between James H. Hart and William N. Dickinson, both of said city of Brooklyn, certifies that James H. Hart hereby agrees to furnish to William N. Dickinson one show case with suitable shelving, also the use of one show window every alternate week during the first year for the purpose of conducting a stationery business in the store 313 and 315 Fulton street, all stock for same to be supplied and all expenses of the department to be borne by William N. Dickinson, in consideration for which privilege William N. Dickinson is to pay to James H. Hart five per cent (5%) of gross sales from date to May 1, 1888, and ten per cent (10%) of gross sales from May 1, 1888, to May 1, 1892.

“Accounting to be made monthly.

“JAMES H. HART.

“WM. N. DICKINSON.”

The plaintiff entered the store and carried on the stationery business as provided in the agreement, until about the first of May, 1889, when he claims the defendant ousted him from the store, and broke up his business, and he brought this action to recover his damages, and he recovered a judgment for \$3,000.

Upon the argument in this court the learned counsel for the defendant called our attention to many exceptions taken by him upon the trial; but we do not deem it important to notice many of them particularly.

The agreement provided that the plaintiff might carry on

his business in the defendant's store for a period of about five years, to the first day of May, 1892. It was evidently contemplated by the parties that the stationery business should become a department in the defendant's store, where he was carrying on the jewelry business. The defendant could not after the plaintiff entered upon his business in the store, so change the character of the business to be carried on there and the arrangements of the store as to make it wholly unfit and unsuitable for the plaintiff's business. The contract was made, not only in reference to the plaintiff's business, but also to the defendant's business. While the defendant may not have been obliged to continue the jewelry business, yet he could not so change the internal arrangement of the store, and so introduce other business therein as to render impracticable and unprofitable, and destroy the plaintiff's business.

We think upon all the evidence it was a question of fact for the jury to determine whether the defendant by what he did and said did not oust the plaintiff from the store, break up his business there and violate the agreement he had made with him; and in submitting the evidence to the jury upon that branch of the case we think the trial judge did not violate any rule of law.

This agreement did not really create the relation of landlord and tenant between the parties. The defendant agreed to furnish the plaintiff with certain facilities to carry on certain business in his store, and the plaintiff was bound to carry on that business there during the period specified in the agreement and to pay the defendant for the privileges accorded to him in the store a certain percentage of his gross sales. The agreement created a business arrangement for the benefit of both parties. The counsel for the defendant is, therefore, in error in claiming that the rule of damages to be applied in this case is that which would have been proper if the relation of landlord and tenant had existed. In such a case, where there has been an eviction, the general rule, to be varied by circumstances is, that the tenant is entitled to recover the difference between the rent reserved and the value of the use

of the premises. But the peculiar nature of this agreement is such that the only general rule of damages which could be applied was the value of the agreement to the plaintiff at the time of its breach. (*Taylor v. Bradley*, 39 N. Y. 129; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 id. 205; *Bernstein v. Meech*, 130 id. 354.)

While the elements from which the jury could determine the amount of the plaintiff's damages were more or less uncertain and problematical, yet we think they were sufficient to furnish a basis for the verdict. The plaintiff proved the gross amount of his sales in each of the two years he was in the defendant's store, and the amount of his net profits, showing that during the last year his sales and profits had largely increased. He also proved what income he was able to make in his business elsewhere during the succeeding year, and what he was able to earn after his business in defendant's store had been broken up; and from these and other facts appearing in the record there was a basis, however unsatisfactory, for the amount of damages awarded by the jury.

We have carefully scrutinized the rules of law laid down by the judge during the trial and his charge to the jury, and we are satisfied that he committed no error.

While the verdict is quite large and if we had the power to deal with it we might regard it excessive, we have no alternative but to affirm the judgment.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

LOUIS ETTLINGER, Respondent, v. THE PERSIAN RUG AND CARPET COMPANY et al., Respondents; THEODORE SCHUMACHER, Appellant.

The holder of bonds issued by a corporation, secured by a trust mortgage, are the real parties in interest, and when any emergency happens which makes a demand upon the trustee to foreclose the mortgage futile, and leaves the right of a bondholder, without other reasonable means of redress, this authorizes his appearance as plaintiff in an action to foreclose.

Plaintiff was one of two bondholders protected by a trust mortgage. In an action to foreclose the mortgage the complaint set forth the requisite facts to justify a foreclosure, and also alleged that the trustee had left this country, was living abroad and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had departed to join him abroad, and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The complaint was dismissed on the ground that plaintiff could not maintain the action where there was a competent trustee unless he refused to act, and if he had become incompetent it was necessary first to procure the appointment of a new trustee. *Held*, untenable; and that the facts proved justified the bringing of the action by plaintiff.

Reported below, 66 Hun, 94.

(Argued March 22, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 18, 1892, which reversed a judgment in favor of defendant Theodore Schumacher, entered upon an order dismissing the complaint on trial at Special Term and ordered a new trial.

This action was brought by plaintiff as holder of a bond of defendant, the Persian Rug and Carpet Company, secured by a mortgage executed by said company to the defendant Paul M. Krause, as trustee, to foreclose said mortgage.

The facts, so far as material, are stated in the opinion.

Francis B. Chedsey for appellant. The complaint was properly dismissed on the ground that the plaintiff could not maintain the action without service of the summons on the

trustee. The power to foreclose the trust mortgage was, by its very terms, vested in the trustee and his successors, who were required to act for the protection of all the bondholders as trustee for them. The plaintiff, as a beneficiary of the trust, could have no cause of action to enforce the trust unless the trustee had refused to do so, or had so acted in violation of the trust as to make a demand on him unnecessary, and then the trustee would have been a necessary party defendant. (*W. R. R. Co. v. Nolan*, 48 N. Y. 513; *Greaves v. Gouge*, 69 id. 154; *Brinckerhoff v. Bostwick*, 88 id. 54; *Crouse v. Frothingham*, 97 id. 105.) It was essential to the plaintiff's right to bring the action that he should have sought to have the appellant, his co-beneficiary, join with him in bringing the action. His failure to do so was set up in the answer found by the court, and the complaint was properly dismissed on this ground. (Code Civ. Pro. § 448; *Hawes v. Oakland*, 104 U. S. 450.) If the trustee was, as alleged in the complaint, incompetent to act (of which no proof was made) his failure to bring the action did not confer any right upon the plaintiff as a *cestui que trust* to bring it. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Mills v. Goodenough*, 9 N. Y. Supp. 764.) The order appointing the receiver and directing a sale was entirely unauthorized, without service of notice of application for the order upon either the trustee or the defendant Schumacher. (Code Civ. Pro. § 714; *Colwell v. G. N. Bank*, 119 N. Y. 408.) The complaint was properly dismissed on the ground that the action was collusive, and instituted and conducted with the purpose of defrauding the creditors of the mortgagor and the defendant Schumacher. (*O'Mahoney v. Belmont*, 62 N. Y. 145; *Howell v. Mills*, 53 id. 322.)

Thomas P. Wickes for respondent. The court had jurisdiction to entertain the action, and to grant the relief prayed for at the suit of the plaintiff, and in such action to appoint a receiver and direct a sale. (*Butler v. Johnson*, 111 N. Y. 204; Code Civ. Pro. § 449; *Hubbell v. Medbury*, 53 N. Y. 99; *Cridler v. Curry*, 66 Barb. 337; *Bort v. Snell*, 39 Hun,

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388, 392; *Davies v. N. Y. C. Co.*, 41 Hun, 492; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 id. 155; *City of Memphis v. Dean*, 8 Wall. 64; *Hollenbeck v. Donnell*, 94 N. Y. 342; *Decker v. Gardner*, 124 id. 334; *N. P. Bank v. Goddard*, 131 id. 497, 500; *Jones on Chat. Mort.* § 787; *Beach on Receivers*, §§ 538, 602, 727; *Crane v. Ford*, *Hopk. Ch.* 114; *Devissee v. Blackstone*, 6 Blatchf. 235; *Bank v. Shedd*, 121 U. S. 74; *Smith v. C. S. Co.*, 28 How. Pr. 377.) The objection to the maintenance of this action is not that the court has not jurisdiction of the subject-matter, or of the person, but that plaintiff had not legal capacity to sue, or has failed to join a necessary co-plaintiff, and this objection, not being taken by demurrer, is waived. (Code Civ. Pro. § 488; *Secor v. Pendleton*, 47 Hun, 203; *H. Ins. Co. v. R. R. Co.*, 11 id. 182; *Sullivan v. N. Y., etc., Co.*, 119 N. Y. 348; *Leadbetter v. Leadbetter*, 125 id. 290.) The court below erred in admitting in evidence the trial balance of the company dated May 1, 1891. The seventh conclusion of law is erroneous. There is no evidence that the sale was unfair or improper. (*Haines v. Taylor*, 3 How. Pr. 206; *Ins. Co. v. Oakley*, 9 Paige, 259.) The ordering of a new trial was in the sound discretion of the Supreme Court, and should not be disturbed. (*F. L. & T. Co. v. B. & M. T. Co.*, 119 N. Y. 15, 23, 24; *Trustees v. Greenough*, 105 U. S. 527; *Woodruff v. R. R. Co.*, 129 N. Y. 27; *In re C. Ins. Co.*, 32 Hun, 78; *In re H. P. Assn.*, 129 id. 288.)

FINCH, J. The determination of a single question discussed on the argument will dispose of this appeal. The plaintiff was one of two bondholders protected by a trust mortgage. His complaint showed all the facts necessary to a judgment of foreclosure if the action had been brought by the trustee, and sought to justify his intervention as bondholder and plaintiff in the action upon the ground that the trustee had left this country, and was somewhere in foreign parts, and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had also departed to join him

abroad; and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The Special Term dismissed the complaint upon the ground that the bondholder could not sue where there was a competent trustee unless the latter refused to act, and where the trustee had become incompetent it was necessary first to procure the appointment of a new trustee. The dismissal of the complaint did not go upon any failure of proof, but assuming the allegations of the complaint to have been established, still held that the plaintiff could not sue for a foreclosure. An appeal was taken to the General Term, which reversed the judgment and ordered a new trial. Instead of going back and presenting his defense so far as he had one, the defendant, who was the remaining bondholder, and for whose interest a foreclosure was as much of a necessity as for that of the plaintiff, adopted the perilous experiment of an appeal to this court, with the required stipulation for judgment absolute. It appeared on the argument that the defendant was injured only at a single point: not by the foreclosure; not by its natural and proper result; not even by the appointment of a temporary receiver; but by a sale of the property claimed to have been collusive, and which vested title in the plaintiff for less than the real value. All that could have been remedied on a new trial. A re-sale could have been ordered, or the plaintiff compelled to account for the property at its just and fair value, which would have given to the defendant everything to which he was entitled. Seeing the situation and observing the defendant's danger, we suggested to his counsel on the argument the prudence of escaping it by a withdrawal of his appeal. He declined the suggestion, and if any hardship results it will not be the fault of the court.

We are satisfied that the plaintiff had the right to maintain the action, and that fact alone justified the reversal of the judgment by the General Term. It is conceded that the beneficiary may sue where the trustee refuses, but that is because there is no other remedy, and the right of the bond-

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holder, otherwise, will go unredressed. The doctrine does not rest rigidly upon a technical ground, but upon a substantial necessity. In the case of a corporation a stockholder may sue, not only because it refuses, but because those who represent it are the very parties who have committed the wrong. (*Brinckerhoff v. Bostwick*, 88 N. Y. 52.) In that case we said that a demand upon the corporation to sue would be "futile" and so was "unnecessary," and since the action could not be "effectually prosecuted in that form" the shareholders might sue. What occurred in the present case was tantamount to and an equivalent of a refusal by the trustee. He had gone beyond the jurisdiction; the whole apprehended mischief would be consummated before he could be reached; and if reached there was sufficient reason to believe that he was incompetent. But the Special Term say that in such event a new trustee should have been appointed. That simply reproduces the same difficulty in another form, for a court would hardly remove a trustee without notice to him and giving him an opportunity to be heard. And why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dictates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs sets the court in motion. The bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress should justify his appearance as plaintiff in a court of equity for the purpose of a foreclosure.

It is unnecessary to consider or discuss other questions, which were numerous. What we have said requires us to affirm the order of the General Term and award judgment absolute against the defendant upon his stipulation, with costs.

All concur.

Ordered accordingly.

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TONEY DE LUKA, Appellant, v. RICHARD GOODWIN et al.,
Respondents.

Plaintiff entered into a contract with M. & R. to do the mason work on certain houses to be constructed by them, in pursuance of a contract between them and defendants. Defendants executed a guaranty to plaintiff for the payment of the several sums agreed to be paid to him by M. & R., at the times and in the manner stated. In an action upon the guaranty these facts appeared: Plaintiff performed the contract on his part until he was notified by M. & R. to stop, and further performance was prevented by their failure to furnish timbers, as agreed, so that the work could be carried on. Plaintiff was at all times ready, able and willing to carry on his contract. Defendants had carried out their contract with M. & R., and the discontinuance of the work was not rendered necessary by any failure on their part. Plaintiff had been paid for the work done by him up to the time of the discontinuance, and claimed to recover the balance of the contract price, after deducting therefrom the sums paid, and what it would cost to complete the work. *Held*, untenable; that the guaranty was not of the whole and entire performance by M. & R., but simply of payment of the installments specified in the contract, at certain periods as the work progressed, and when the house arrived at certain stages; and as the conditions under which the unpaid installments were to become due had not happened, the complaint was properly dismissed.

(Argued March 22, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 30, 1892, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Special Term.

This was an action upon a guaranty executed by defendants and annexed to a building contract entered into by plaintiff with the firm of D. C. Ross & Co.

The guaranty in question and the facts, so far as material, are stated in the opinion.

Joseph A. Burr for appellant. Whatever damages plaintiff has sustained by reason of the inexcusable failure of Miller & Ross to pay the amounts specified in their agreement with

him at the time, and in the manner therein specified, defendants are liable for. He who guarantees the act of another is bound to see that the latter fulfills the engagement made in his behalf. (9 Am. & Eng. Ency. of Law, 80.) A contract of a surety is to be construed so as to give effect to the intention of the parties. That intention must be gathered from and in some respects controlled by the nature of the contract entered into, and it must be interpreted in the light of the circumstances attending the execution of the instrument. (*R. C. Bank v. Elwood*, 21 N. Y. 88; *Powers v. Clark*, 127 id. 417; *Belloni v. Freeborn*, 63 id. 388; *Crist v. Burlingame*, 62 Barb. 351; *C. N. Bank v. Phelps*, 97 N. Y. 44; *Schwartz v. Heyman*, 107 id. 562; *Beakes v. Decuna*, 26 id. 293; *People v. Backus*, 117 id. 196; *McElroy v. Mumford*, 128 id. 303.) It is true that there is no express stipulation in the agreement between plaintiff and Miller & Ross that they will proceed with their part of the work, or that they will abstain from interfering with and preventing the plaintiff performing his work; but, if necessary, the court will imply such an agreement to exist. (*Booth v. C. M. Co.*, 74 N. Y. 15; *Mansfield v. N. Y. C. R. R. Co.*, 102 id. 211.) It seems to be conceded, and the court below expressed its opinion, that if the action had been against Miller & Ross the plaintiff would have been entitled to recover from them over \$4,000, because where a party has by his own act made the performance of a condition precedent impossible, he is estopped from denying that the plaintiff has not performed. (*Rockwell v. Hurst*, 36 N. Y. S. R. 735; *Risley v. Smith*, 64 N. Y. 576.) If then the contract was to be as strictly construed as it was by the court below, so that performance of the condition precedent that the payments had become due at the times and in the manner above specified, or its equivalent must be shown to make defendants liable, still the plaintiff must recover. For where the principal is concluded by his acts, the surety, in the absence of fraud or collusion, is concluded also. (*Douglass v. Howland*, 24 Wend. 35; *McLean v. Watson*, 26 id. 435; *Cassoni v. Jerome*, 58 N. Y. 315; *Schofield v. Underhill*, 72

id. 565.) As the plaintiff was induced to enter into the contract with Miller & Ross by the agreement of the defendants to make to him the payments therein specified, that was an original agreement on the part of the defendants which made them liable as the principal debtors. (*Dunham v. Morrow*, 2 N. Y. 542; *Brown v. Curtis*, Id. 228; *Brown v. Arkell*, 40 Ark. 429; *Baldwin v. Hires*, 73 Ga. 739; *Lent v. Paddleford*, 10 Mass. 230; *Gridley v. Capon*, 72 Ill. 11.) Although the contract between plaintiff and Miller & Ross provided that he was to take a second mortgage as part payment, he is entitled to recover the entire amount of his damages in money, because if a contract price is to be paid in merchandise, which is refused, an action may then be had for the money itself. (*Chase v. Leffler*, 12 Wkly. Dig. 182.) The court also erred in admitting the evidence objected to by the plaintiff as to the former action. (Abb. Tr. Brief, § 765.)

Paul E. De Fere for respondents. The defendants are not liable. They made a distinct contract of guaranty, and can be made liable only by its express terms. They have no implied liability whatever. (*Grant v. Smith*, 46 N. Y. 93-97; *Kingsbury v. Westfall*, 61 id. 360; *Miller v. Rinehart*, 119 id. 368-378; *Benjamin v. Rogers*, 126 id. 70; *Bank v. Ewing*, 131 id. 508; *Miller v. Stewart*, 9 Wheat. 681, 702, 703.) Plaintiff's quitting work was a breach of his obligation to the guarantors and inconsistent with their right to have him go on. (9 Am. & Eng. Ency. of Law, 81.)

PECKHAM, J. The sole question here arises as to the meaning of the guaranty signed by defendants.

The plaintiff had entered or was about to enter into a contract with Miller & Ross to do the mason work upon some houses which they were then intending to erect in Brooklyn on land which they had purchased from the defendant Goodwin. They had agreed with Goodwin to build the houses of a specified kind, and he had agreed with them to loan them the sum of \$15,000, to be secured by their bond and by a

mortgage on the land. The loan was to be made in installments as the work progressed on each house and at certain specified stages of the work.

The agreement between plaintiff and Miller & Ross was in writing, and the plaintiff was to be paid a certain named sum when the basement walls on any three buildings were built ready for the second tier of beams, and certain other sums when certain other and further work had been done, the sum total being \$16,750. The defendants then signed the guaranty which follows the agreement between plaintiff and Miller & Ross, and it is in this language:

"In consideration of the party of the second part above named entering into the covenants contained in the foregoing agreement, and in consideration of the sum of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, we, Richard Goodwin and John W. Phelps, hereby jointly and severally guarantee to the said Toney De Luka, party of the second part as aforesaid, the payment of the several sums agreed to be paid to him in the foregoing agreement at the times and in the manner therein specified.

"Dated *July eighth*, 1890.

"GOODWIN & PHELPS."

After the execution of the agreements above mentioned the plaintiff entered upon the work and did everything he was called upon to do by his agreement with Miller & Ross up to the 26th of August, 1890, when they notified him to stop work, and it would have been necessary to stop in a few days in any event owing to their inability and failure to comply with their obligation to furnish timber so that the work could be carried on. The plaintiff was at all times ready, able and willing to carry on his contract with Miller & Ross, and would have completed the work according to his contract if he had not been prevented by their action. The defendants on their part had also carried out their contract with Miller & Ross, and the discontinuance of the work was not rendered necessary by reason of any failure on the part of the defendants.

The court found as a fact that after deducting from the contract price of the work the sum necessary to complete the performance of the contract by the plaintiff, and the sum already paid to him on account thereof, there would be a balance of \$4,399. This sum the plaintiff claims the defendants must pay by reason of the above guaranty, although the houses have not been built or the work done as provided in the plaintiff's contract with Miller & Ross.

If this guaranty is to be construed as one which guarantees the whole and entire performance of the contract on the part of Miller & Ross, then the defendants would probably be liable, while if it be treated as one which simply guaranteed that Miller & Ross would pay the plaintiff certain amounts of money at certain periods of the progress of the work provided for in the contract, it seems to be plain that the plaintiff has failed to prove his case.

We think the latter construction of the contract of guaranty is the true one.

The first reason that causes us to think so is that the contract itself says so in plain language. The defendants simply guarantee the payment of the several sums agreed to be paid the plaintiff by the agreement between him and Miller & Ross at the times and in the manner therein specified. That seems to be a plain and unambiguous contract and one which does not require the aid of surrounding circumstances to make clear its meaning. But if they are looked at the meaning seems to remain the same. The defendant Goodwin owned the land which he sold to Miller & Ross, and they were to put up the houses and he agreed to loan them \$15,000 to be paid in installments as the work of building progressed. By a subsequent agreement Goodwin & Phelps agreed to advance to Miller & Ross an additional \$1,000, secured by another bond and mortgage, and payable, with interest, on or before six months from their date. The circumstances surrounding the parties were such that defendants might be ready to make such a contract of guaranty as we think this was, and be at the same time quite unwilling to guarantee the full perform-

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ance of the contract by Miller and Ross. If they simply were to guarantee the payment at the prescribed times they knew that as each installment became due the plaintiff from Miller & Ross the security of defendants' mortgage upon the land and buildings became better, and they might be willing to run the risk of the honest application of the loan made Miller & Ross to the building of the houses, while they would be unwilling to risk and to guarantee their ability to go on with the performance of the contract in other respects, such as placing the buildings and keeping them in readiness and condition for the work by plaintiff. The result shows the reasonableness of the distinction.

Miller & Ross have been unable to go on with their work in furnishing lumber so that plaintiff might do his work, and it is from no fault of defendants that Miller & Ross have so failed. The fact now appears that the buildings have not arrived at that stage when any further payments are due plaintiff under the contract, and consequently no breach of defendants' contract has occurred. The defendants have not guaranteed that Miller & Ross should furnish the lumber. They only guaranteed they would pay certain amounts when the houses arrived at certain stages in the progress of their erection. They have not yet been thus far built. There is nothing in the language of the guaranty which imposes an obligation on defendants' part to see to it that Miller & Ross will so act that plaintiff will be enabled to go on and build the houses and thus complete his contract with them. On the contrary, the guaranty is quite clearly otherwise. Nor are the defendants estopped from asserting that the conditions upon which they agreed to guarantee the payments to plaintiff have never happened. There is no question of estoppel in the case.

We think the decision made by the Special Term was correct, and its judgment dismissing the complaint should be affirmed, with costs.

All concur.

Judgment affirmed.

HENRY STUBER et al., as Administrators, etc., Appellants, v.
JAMES D. McENTEE, Respondent.

The cause of action given by the statute (Code Civ. Pro. §§ 1902-1905) to the executors or administrators of a deceased person, to recover damages for negligence causing his death, is no part of the assets of his estate; it is not subject to the payment of his debts or to the ordinary rules applicable to the settlement and administration of the estates of deceased persons.

The claim cannot be barred or released before suit except by some person who has at the time authority to bring the action.

In an action under the statute it appeared that defendant paid to one of the plaintiffs before his appointment as administrator a sum of money, he giving a receipt therefor which stated that the payment was for all expenses caused by the death, and that he had no further claim against defendant. *Held*, that the receipt was not a settlement of the claim or a bar to the action.

It seems that in such case defendant would be entitled to show that the money paid was used to pay the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in estimating the damages.

Rattoon v. Overacker (8 Johns. 126); *Priest v. Watkins* (2 Hill, 225), distinguished.

Defendant was a plumber; the deceased, an apprentice in his employ. It appeared that the deceased was killed by the caving in of the sides of a trench or excavation in which he was engaged in plumbing work. *Held*, that in the absence of other proof or explanation, the inference was reasonable or at least possible, that the trench was the place furnished the servant by defendant in which to do his work, and so a refusal to submit the question to the jury was error.

The complaint alleged in substance that the deceased, while in the employ of defendant, was directed by him "to go down and do certain work in the excavation" which he had caused to be made, and while therein, following defendant's instructions, the side of the excavation, by reason of its not having been properly constructed by defendant, fell in, causing the death. Defendant's answer simply denied that he directed the decedent to "go down and do certain work in an excavation which this defendant had caused to be made." *Held*, that this was not such a denial as is required by the Code of Civil Procedure to put in issue the averments of the complaint that defendant caused the trench to be made, and directed the deceased to work in it, and while, in the absence of a motion to correct the answer and make it more certain, it might be regarded as good upon appeal, yet, as the whole scope of the answer assumed the fact that defendant made the trench and directed the

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deceased to work therein, and as a non-suit was granted on the assumption of defendant's negligence, on the grounds of contributory negligence and a release, the point of a failure of evidence to show that defendant did make the trench or direct the deceased to work therein, could not be availed of to support the non-suit.

(Argued March 22, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 5, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit, and also affirmed an order denying a motion for a new trial.

This action was brought by plaintiffs, as the administrators of William Stuber, deceased, to recover damages for his death, which was alleged to have been caused by the negligence of defendant.

The facts, so far as material, are stated in the opinion.

A. Edward Woodruff for appellants. It is submitted that as to whether the deceased, a lad eighteen years old, and working as an apprentice for the defendant, was or was not guilty of contributory negligence, was, on the conceded facts of the case, a question to be determined by the jury. The deceased was not only an infant, but an apprentice of the defendant. (*Wallace v. C. V. R. R. Co.*, 138 N. Y. 302; *Kranz v. L. I. R. R. Co.*, 123 id. 1; *McGovern v. C. V. R. R. Co.*, Id. 280, 289; *McNamara v. N. Y. & H. R. R. Co.*, 136 id. 650; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 72; *Stackus v. N. Y. & H. R. R. Co.*, Id. 464; *Fisher v. Vill. of Cambridge*, 133 id. 527; *Gates v. State*, 128 id. 221; *Peil v. Reinhart*, 127 id. 381; *Pomeroy v. Vill. of Saratoga Springs*, 104 id. 459; *Palmer v. Dearing*, 93 id. 7; *Bassett v. Fish*, 75 id. 304; *Weed v. Vill. of Ballston Spa*, 76 id. 619; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; *Pantzer v. T. F. I. Co.*, 99 id. 368; *Shehan v. N. Y. C. R. R. Co.*, 91 id. 332; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206; *Stringham v. Stewart*, 100 id. 516; *Plank v. N. Y.*

C. R. R. Co., 60 id. 607; *Hawley v. N. Y. C. R. R. Co.*, 82 id. 370; *Cullen v. Norton*, 126 id. 1; *Benzing v. Steinway*, 101 id. 547; *Hart v. H. R. B. Co.*, 80 id. 622; *Filbert v. D. & H. R. R.*, 25 J. & S. 170; *Brown v. T. T. S. R. R.*, Id. 356; *G. T. R. R. Co. v. Ives*, 144 U. S. 408; *N. Y., L. E. & W. R. R. Co. v. A. R. Co.*, 129 N. Y. 597; *Morrison v. B. R. R. Co.*, 130 id. 166; *Dollard v. Roberts*, Id. 269; *Coughtry v. G. W. Co.*, 56 id. 124.) As to the receipt given by Mr. Krause, which the court held was sufficient to sustain the non-suit, we submit that it speaks for itself, and on its face refers to simply a matter between the defendant and Mr. Krause personally. It was beyond the power of Mr. Krause to do anything that could affect any claim the estate of the deceased might have under this statute. (Code Civ. Pro. §§ 1902, 1903; *Murray v. Usher*, 117 N. Y. 545; 1 Williams on Executors, 470, 471; *Mellen v. Brown*, 1 H. & C. 686; *Holland v. King*, 6 C. B. 727; *Doe v. Glenn*, 1 Ad. & El. 49; *Bellinger v. Ford*, 21 Barb. 311; *Ledyard v. Bull*, 119 N. Y. 62.) It was error to hold plaintiffs' intestate guilty of contributory negligence as matter of law. (*Salisbury v. Home*, 87 N. Y. 134; *McGovern v. C. V. R. R. Co.*, 123 id. 280.)

Thomas C. Ennever for respondent. The complaint was properly dismissed because plaintiffs' intestate was guilty of contributory negligence. (*Kranz v. L. I. R. R. Co.*, 123 N. Y. 1.)

O'BRIEN, J. The plaintiffs' intestate, a young man about eighteen years old, was killed May 12, 1890, while working in a hole or trench about thirteen feet deep and four or five feet square, by the caving in of the earth and stone which formed the wall of the excavation. The defendant is a plumber and the deceased was his apprentice. The plaintiffs sought to maintain this action upon the allegation that the death was the result of negligence on the part of the defendant in not properly shoring up or supporting the walls of the excavation where the deceased was at work. The trial resulted in a non-suit. It was shown in behalf of the defendant that

after the death he paid to one of the plaintiffs in this action, a brother-in-law of the young man, the sum of \$400, which was used by the family to pay the funeral expenses and the cost of a lot in the cemetery and to purchase a gravestone to mark the burial place. The plaintiff who received the money was not then, but subsequently was appointed, one of the administrators of the deceased. He gave a receipt for the money to the defendant, in which it was stated that the payment was for all expenses caused by the untimely death of the young man, and "further, that I shall have no further claim whatsoever against Mr. McEntee." In deciding the motion for a non-suit, the learned trial judge assumed that a case of negligence on the part of the defendant, in omitting to shore up or support the excavation, was shown, but granted the motion upon two grounds: (1) That the deceased was guilty of contributory negligence. (2) That the receipt for the payment of the \$400 was a settlement of the claim and a bar to the action.

Actions for damages by reason of injuries resulting in death were unknown to the common law and are founded wholly upon the statute. The cause of action is no part of the assets of the estate of the deceased. The statutory liability has no existence in his lifetime and accrues only by reason of his death. It is not subject to the payment of the debts of the deceased nor to the ordinary rules applicable to the settlement and administration of the estates of deceased persons. (Code, §§ 1902-1905.) The damages are not general assets of an estate of a deceased person in the hands of the executor or administrator and subject to their control, but are exclusively for the benefit of the decedent's husband or wife and next of kin. The claim before suit cannot be barred or released except by some person who has authority to bring the action at the time and who in a legal sense represents the right of action. When the plaintiff Krause gave the receipt and received the money he was in no such position and had no authority to bind the next of kin of the deceased by a settlement or release. The cases cited by the learned trial judge in support of his view

do not, we think, control the question. It is only necessary to refer to the two leading cases in this state. (*Rattoon v. Overacker*, 8 Johns. 126; *Priest v. Watkins*, 2 Hill, 225.) These cases hold that when a person assumes to collect the assets or credits belonging to the estate of a deceased person, and who subsequently is appointed administrator of the estate, and in that capacity brings an action upon the claim so collected, the prior payment made to him before his appointment is a defense to the party against whom the claim existed and who made the payment. For the purpose of protecting parties making payment in good faith to the widow or other person without authority to collect the assets at the time, the letters when subsequently issued to them, are deemed to relate back so as to legalize such payments. But these cases do not hold that a stranger may compromise a claim due to an estate on receiving a part only of what is due and thereby estop himself in a subsequent suit, in a representative capacity, from collecting the residue. If there is any such rule of law in the administration of the estates of deceased persons it has no application in an action like this for the recovery of unliquidated damages under a special statute by the next of kin resulting from a negligent or wrongful act, causing the death of their intestate. We have no doubt that the defendant was entitled to prove the fact of payment and its application to the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in making its estimate of the damages which the plaintiff should recover, if any. In this way the principle decided in the cases above referred to is given full effect, but to hold that the receipt operated as an accord and satisfaction would be extending its operation in a manner to accomplish results that cannot be sustained by reason or authority.

If the defendant made the excavation for the deceased to perform his work in, or if, having seen its condition, he directed him to work in it, then the servant was not as matter of law guilty of contributory negligence. It was a question for the jury within the doctrine of *Kranz v. L. I. R. Co.*

(123 N. Y. 1). It is now claimed that there was no proof that the deceased was directed by the defendant to work in the trench, or that the defendant dug it, or had ever seen it, or that he knew anything about it, and hence negligence on his part was not established. It must be admitted that the proof on these points is very meagre. The course of the trial, however, would seem to indicate that they were assumed and such was the view of the learned judge in granting the motion for a non-suit. It may be that upon a full trial it can be made to appear that the master was not so connected with the excavation as to render him responsible for the results of the accident. But as the plaintiffs were non-suited they are now entitled to the benefit of every fact established and every inference that might properly have been drawn by the jury, and the case must be viewed in the most favorable light that it could fairly have been by the jury, had it been submitted upon the evidence as given. It was sufficiently shown that the defendant was engaged in the plumbing business, that the deceased was his apprentice, in his employment, and when killed actually engaged in plumbing work in the excavation. In the absence of other proof or explanation the inference that the trench was the place which the master furnished the servant in which to do his work, would seem to be reasonable or at least possible. In the receipt which the defendant took for the \$400 the deceased is described as "a plumber assistant in the employ of said Mr. McEntee." Nothing appears in the case to justify any inference that the deceased was at the time of his death working for any other person or subject to any other directions. Moreover, we think that the defendant tendered no issue in his answer in the form required by the Code upon the allegations of the complaint which were to the effect that the defendant caused the trench to be made and directed deceased to work in it. On this point the allegation of the complaint is as follows: "That on or about the 12th day of May, 1890, the plaintiffs' intestate, William Stuber, while in the employ of the defendant, was directed by the defendant to go down and do certain work in an excavation,

which the defendant had caused to be made in West 116th street, in the city of New York, between Seventh and Eighth avenues, in said city, about 400 feet or thereabouts east of Eighth avenue, and while in said excavation and following the directions of the defendant, the said excavation, by reason of its not having been properly constructed by said defendant, and by reason of the neglect and improper conduct of the defendant in not properly constructing and making said excavation, and in not making the same safe and fit to work in, and in accordance with the Laws of the State of New York in such case made and provided, the earth on the side and around said excavation fell in and upon the plaintiffs' intestate, the said William Stuber, and covered and buried him in the said excavation, inflicting injuries which caused his death."

It will be seen that the fact that the defendant directed the deceased to work in an excavation which he had caused to be made is sufficiently alleged. The defendant has put the allegation in issue only by the use of the following language in the answer :

"*First.* This defendant denies that he directed William Stuber to go down and do certain work in an excavation to which this defendant had caused to be made in West 116th street in the city of New York, between Seventh and Eighth avenues in said city, about four hundred feet or thereabouts west of Eighth avenue."

This is not such a denial as is authorized by the Code. It is a species of negative pregnant. (*Wall v. Buffalo Water Works Co.*, 18 N. Y. 119; *Baker v. Bailey*, 16 Barb. 54.) It may be that, in the absence of a motion to correct and make more certain, such pleadings may be regarded as good upon appeal. But the whole scope of the answer, even when setting up affirmative defenses, assumes the fact the absence of which is now claimed to be fatal to the plaintiffs' appeal. In view of the fact that the non-suit was not granted on any such grounds, but, on the contrary, the defendant's negligence was assumed in granting the motion, considering the form and

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substance of the pleadings, the manner in which the trial was conducted and the inferences which the jury were entitled to draw from the proof given, we think that this point is not now sufficient to sustain the judgment of non-suit, and that there should be a new trial.

The judgment should, therefore, be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed. _____

HENRY MCSHANE COMPANY, Limited, Appellant, v. WILLIAM PADIAN, Respondent.

Defendant executed to plaintiff a guaranty of the payment by W., a plumber, "for any and all materials which they may deliver" to him; defendant, however, "not to be liable for any balance exceeding five hundred dollars which may become due." In an action upon the guaranty, *held*, that its language was so clear and unambiguous as to furnish conclusive evidence of its meaning; that it was a continuing guaranty, limited to a balance "which may become due," not exceeding the sum specified, but it did not undertake to regulate the amount of W.'s future transactions with plaintiff; and so, that the receipt of evidence and a finding to the effect that the instrument was not intended as a continuing guaranty, other than for goods sold to be used in the performance of a certain contract, were errors.

(Argued March 22, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made March 14, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial before a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Thomas C. Ennever for appellant. The written agreement or guaranty was not obtained by misrepresentation and the defendant is bound by it. (*Moran v. McLarty*, 75 N. Y. 25.) The defendant is bound by the terms of the writ-

ten guaranty or agreement, and oral evidence is inadmissible to limit or modify the terms thereof. (*Belloni v. Freeborn*, 63 N. Y. 383.) Even conceding that the surrounding circumstances might be resorted to, yet there was no evidence sufficient to limit or change the terms of the written agreement. (*Gates v. McKee*, 13 N. Y. 232; *White's Bank v. Myles*, 73 id. 335.) The opinion given at General Term does not properly apply the law to the case at bar. (*People v. Lee*, 104 N. Y. 441.)

William J. Fanning for respondent. It was proper for the referee to inquire into the circumstances under which and the purpose for which the guaranty was given. (*E. N. Bank v. Kaufmann*, 93 N. Y. 280; *W. Bank v. Myles*, 73 id. 335; *Hamilton v. Van Rensselaer*, 43 id. 245; *Church v. Brown*, 21 id. 314; *Rindge v. Judson*, 24 id. 65; *Barney v. Forbes*, 118 id. 580; *U. S. N. Bank v. Ewing*, 131 id. 506; *Bank of Hamilton v. Klock*, 73 Hun, 304; *Rapelye v. Barley*, 5 Conn. 149; *Fellows v. Prentice*, 3 Den. 512; *Christ v. Burlingame*, 62 Barb. 351; *Bell v. Buen*, 1 How. [U. S.] 169, 186; *A. Bank v. Stever*, 18 N. Y. 510; *Gates v. McKee*, 13 id. 231; *Bailey v. R. R. Co.*, 17 Wall. 105; *Rogers v. Warner*, 9 Johns. 119; *Whitney v. Groot*, 24 Wend. 82; *Morgan v. Boyer*, 39 Ohio St. 324; *White v. Reid*, 15 Conn. 457.) The written list of materials submitted by Weigers to plaintiff; the plaintiff's written estimate thereon, and the guaranty given by defendant pursuant thereto, should be read together as constituting one transaction, and parol evidence is admissible for the purpose of connecting these several transactions. (*Sherwood v. Hauser*, 94 N. Y. 626; *Baird v. Mayor, etc.*, 106 id. 578; *Sistare v. Olcott*, 15 N. Y. S. R. 251; *Healey v. Clark*, 12 id. 685; *Peacock v. Comstock*, 17 Wkly. Dig. 252; *Kreischer v. Vetter*, 4 N. Y. S. R. 786; *Wiswall v. O'Brien*, Id. 797; *Crim v. Starkweather*, 136 N. Y. 635.) A guaranty drawn by the person for whose benefit it is given, and presented by him to the guarantor for signature, will not be construed against the latter as strictly as if it had been drawn by himself. (*Cochran*

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v. *Kennedy*, 10 Daly, 346.) It does not appear that any of the payments were applied by plaintiff to any particular indebtedness of Wieggers, and, under these circumstances, it is well settled that the court must apply the payments first to such indebtedness as will release a surety from liability. (*O. C. N. Bank v. Moore*, 112 N. Y. 544.)

BARTLETT, J. The plaintiff seeks to recover of the defendant upon the following guaranty :

"I, William Padian, hereby guarantee to the Henry McShane Company, Limited, the payment by John P. Wieggers, plumber, to them for any and all materials which they may deliver to John P. Wieggers, I not to be liable for any balance exceeding five hundred dollars which may become due.

"WILLIAM PADIAN.

"Witness, WM. H. BARTTH.

"Dated NEW YORK, March 31st, '90."

This case was tried before a referee, who held that the guaranty was susceptible of two constructions, and admitted, to quote from his opinion, "oral evidence of the *res gestæ* so as to arrive at the probable intention of the parties." The evidence was admitted against the objection and exception of plaintiff. Upon conflicting evidence the referee found substantially that the guaranty had reference to certain goods sold by plaintiff to John P. Wieggers, to be used in the performance of a contract named, and that before the commencement of this action Wieggers had paid for them; he further found that said guaranty was not intended by the parties thereto as a running or continuing guaranty other than for the goods already referred to, and dismissed the complaint, with costs.

The general term of the court of common pleas for the city and county of New York affirmed a judgment for the defendant entered upon the report of the referee. The question presented on this appeal is whether the language of the guaranty is so ambiguous as not to furnish conclusive evidence of its meaning, and entitles the defendant to prove the circum-

stances under which it was executed, so that the court can construe it in the light of all the facts. If this ambiguity exists the evidence of the circumstances surrounding the execution of this guaranty was properly admitted (*Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 281, and cases cited; *White's Bank v. Myles*, 73 id. 341), and as the findings of the referee were made on conflicting evidence they are not reviewable in this court. (*Sherwood v. Hauser*, 94 N. Y. 626; *N. Y. Fire Department v. Atlas Steamship Co.*, 106 id. 578; *Crim v. Starkweather*, 136 id. 635.) We are, however, unable to agree with the learned court below in its construction of this guaranty. We regard its language as clear, presenting no ambiguity, and as creating a continuing guaranty which, by its terms, limits defendant's liability to any balance, not exceeding five hundred dollars, which may become due, but does not undertake to regulate the amount of John P. Wieggers' future transactions with the plaintiff. The cases are numerous construing instruments of this character, and it is not always an easy task to determine on which side of the line separating continuous from limited liability they belong. In *Whitney v. Groot* (24 Wend. at page 84) Chief Justice NELSON remarks: "It is, in most of these cases, a nice and difficult question to determine whether the guaranty is a continuing one or not. The intent of the party to be derived from the words is the only sure guide; and, therefore, very little aid is to be derived from the adjudged cases as they turn upon the peculiar phraseology of the guaranty." In *White's Bank v. Myles* (73 N. Y. at page 341) Judge EARL says: "Precedents do not help much in the construction of such instruments." In *Gates v. McKee* (13 N. Y. at page 234) Judge DENIO says: "The cases are not entirely harmonious as to the principles of construction which ought to govern in this class of cases, but the weight of authority is altogether in favor of construing guarantees by rules at least as favorable to the creditor as those which courts apply to other written instruments, irrespective of the consideration that the guarantor is a surety." In the leading English case of *Mason v. Pritchard* (12 East,

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227) the court said the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit. The Supreme Court of the United States has also expressed the same views. (*Drummond v. Prestman*, 12 Wheat. 515; *Douglass v. Reynolds*, 7 Peters, 113, 122; *Lawrence v. McCalmont*, 2 How. [U. S.] 426.)

Applying these principles to the guaranty now under consideration it leads to the construction we have already indicated. The natural and ordinary import of its language discloses an intent on the part of the defendant to guarantee the purchases of Wiegers from plaintiff of any and all materials provided his liability was not to exceed five hundred dollars, on any balance which might become due.

To place upon this instrument the construction contended for by defendant, is to ignore its plain provisions and import into the case an entirely new contract. The defendant contends he was only guaranteeing payment of three hundred and ninety-five dollars worth of specific materials which were to be used in the performance of a certain building contract. On the other hand, the plaintiff states that Wiegers was a young man starting in business and it was customary to require a guaranty in such cases. The evidence in the case shows that Wiegers, after the execution of the guaranty, made purchases of plaintiff aggregating between six and seven thousand dollars and made payments of between four or five thousand dollars, and owed plaintiffs a balance of twenty-two hundred dollars when this action was commenced. We hold, however, that parol evidence was inadmissible as to surrounding circumstances to aid in construing this guaranty, and rest our decision upon the language of the instrument solely. The answer of the defendant alleges that he was induced to sign the guaranty by the false and fraudulent representations of plaintiff, made through its agents. The proof failed to establish this defense and the referee made no such finding.

The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

HENRY E. WESSELS et al., Respondents, v. GUSTAVUS ADOLPHUS BOETTCHER, Appellant.

Upon motion to set aside an attachment granted, on the ground that defendant was a non-resident, it appeared that plaintiffs brought the action, as assignees of the claim set forth in the complaint; that their assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, and before the motion costs were paid this action was brought. *Held*, that while plaintiffs' assignors were stayed (Code Civ. Pro. § 779), the stay did not render the present action and the proceedings thereon void, and did not deprive the court of jurisdiction, but only rendered further proceedings irregular; and so did not affect the validity of the attachment; and that it was competent for the court below to deny the motion, in case plaintiffs paid the costs of the former action within twenty days.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of December, 1893, which affirmed conditionally an order of Special Term denying a motion to vacate a warrant of attachment.

The facts, so far as material, are stated in the opinion.

Noah Cornwell Rogers for appellant. The facts alleged in the affidavit upon which this warrant of attachment was granted were insufficient to give the court jurisdiction, and the granting of the warrant was, therefore, beyond the power of the court. (*Goodrich v. Dorman*, 38 N. Y. S. R. 198; *Finlay v. De Castroverde*, 68 Hun, 59; *Tim v. Smith*, 93 N. Y. 87; *Mott v. Lawrence*, 17 How. Pr. 559; *St. Amant v. de Beizcedon*, 3 Sandf. 704; *Dolz v. A., etc., Co.*, 3 Civ. Pro. Rep. 164; *Wessels v. Boettcher*, 69 Hun, 306; Code Civ. Pro. § 229.) Plaintiffs were stayed from the bringing of this action, and all the proceedings had in reference to it were not merely voidable, but void. (*Mc Whinnie v. Cameron*, 19 Civ. Pro. Rep. 168; *Gardenier v. Eldred*, 21 id. 221; *Bartow v. Speis*, 73 N. Y. 133; Code Civ. Pro. § 779.) No sufficient

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service of the summons herein has ever been made. (Code Civ. Pro. §§ 442, 443.)

J. A. Shoudy for respondent.

BARTLETT, J. The plaintiff sued defendant for breach of an express contract, and obtained a warrant of attachment on the ground he was a non-resident. The record discloses that defendant is a resident of the West Indies, and appears in this action specially by attorney for purpose of motion to vacate the attachment. This motion was based on four grounds, viz. :

1. Plaintiffs were stayed by reason of non-payment of motion costs in a former action on the same cause of action.

2. Insufficient affidavit upon which the attachment was obtained.

3. That no notice was served with the summons, as required by section 443 of the Code of Civil Procedure.

4. That personal service of the summons was not made within thirty days after issuing warrant of attachment.

The special term denied the motion and the general term affirmed this order if plaintiffs paid motion costs in former action within twenty days after service of order, otherwise reversed it.

As to the first ground, it appears that the plaintiffs are the assignees of the claim sued on herein; that their assignors had previously sued thereon and obtained an attachment which was vacated by the court granting it, and the order affirmed in this court (138 N. Y. 654); that this action was brought before said motion costs were paid, and while plaintiffs' assignors were stayed under the provisions of section 779 of the Code of Civil Procedure. The defendant's counsel insists that the effect of this stay was to render the present action and all proceedings therein absolutely void, and that the general term had no power to make the conditional order referred to. The stay of proceedings, under section 779 of the Code, has no such effect and does not deprive the

court of jurisdiction when set in motion by the party resting under a stay. The only effect is to render the proceedings irregular, and when brought to the attention of the court the party violating the stay will be dealt with as may be proper. In this case it was competent for the general term to deal with the stay of proceedings and its violation in the manner already referred to. The regularity of the attachment was in no way affected by this stay of proceedings and its violation.

As to the second ground alleging insufficiency of affidavit, we are of opinion that the affidavit sets forth a good cause of action and is sufficient to sustain the warrant of attachment. We have examined the record in the first action brought by plaintiffs' assignors and find that the affidavit in the case at bar cures the defects of the former affidavit.

As to the third ground it appears by the affidavits of Robert M. S. Putnam and David Gibson that the notice required by sections 442-3 of the Code was personally served on the defendant without the state. These positive statements under oath override the allegations made on behalf of defendant upon information and belief, and the alleged fact that the notice is not on file with the clerk of the city and county of New York.

As to the fourth ground that the summons was not served within thirty days after warrant of attachment was issued. The attachment was issued July 6, 1893, and David Gibson swears that on the 25th of July, 1893, at Spanishtown, Island of Jamaica, British West Indies, he made personal service of the summons on the defendant.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

CHARLES S. MURPHY, Respondent, v. WILLIAM C. JACK et al.,
Appellants.

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While it is not necessary to the validity of an attachment that the affiant, upon whose affidavit the writ is applied for, should have personal knowledge of the facts required to be stated, and the same may be stated on information and belief, it is essential that his information should appear to have been competently derived. The sources of the information must be disclosed in such a way as to enable the court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts.

An attachment was granted upon an affidavit of plaintiff's attorney; the averments therein were stated to be upon information and belief, the information and grounds of belief being statements of plaintiff, who was in Boston, and his counsel residing there, who (as the affidavit stated) "have both talked to deponent this morning over the telephone from Boston." It was not stated and did not appear that the affiant was acquainted with plaintiff and recognized his voice, or in any other way knew it was the plaintiff who was talking to him. *Held*, that the affidavit was insufficient; that while the necessary information may be communicated by telephone it must appear that the affiant knew the person so communicating with him and recognized the voice, or in some way such person must be identified.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 16, 1894, which reversed an order of Special Term vacating an attachment and reinstating the same.

This action was brought to recover for goods sold and delivered by plaintiff to defendants. The complaint was on information and belief and was verified by one of the plaintiff's attorneys; who, in the verification, stated the reason for his making it to be the absence of the plaintiff in Massachusetts and that his belief was based upon the statements made to him by the plaintiff and by his Boston attorney. Accompanying the complaint, and sworn to upon the same day, was an affidavit by the same attorney; in which he stated that, as he was informed and believed, the plaintiff was entitled to recover the sum claimed as damages for the breach of an

express contract, over and above all counterclaims known to the plaintiff, upon a cause of action existing in his favor against the said defendants, upon the facts set out in the annexed complaint and that, as deponent was informed and believed, the said defendants are not residents of the state of New York, but that both reside at Gardiner, in the state of Maine. The affidavit then proceeds to state that the "deponent's belief as to the facts above stated" is based upon statements of the plaintiff and the plaintiff's Boston attorney; "who have both talked to deponent this morning over the telephone from Boston" and that "they narrated the facts to deponent exactly as they have been set forth in the complaint, etc." The affiant asked for an attachment, "without waiting for affidavits to be obtained from Boston;" upon the ground that the property was "likely to be removed." A warrant of attachment having been issued upon the complaint and affidavit, an application to vacate it was granted. Upon appeal to the General Term, the order vacating the attachment was reversed and the attachment reinstated. The defendants now appeal to this court.

William S. Maddox for appellants. The order is appealable. (*Allen v. Meyer*, 73 N. Y. 1; *S. C. Bank v. Alberger*, 78 id. 252-258; *Ruppert v. Haug*, 87 id. 144.) There is no proof of facts upon which an attachment may be granted. (Code Civ. Pro. §§ 635, 636; *Ruppert v. Haug*, 87 N. Y. 141; *K. S. B. Co. v. Inman*, 53 Hun, 39; *M., etc., R. Co. v. Heidenheimer*, 82 Tex. 195; *Wolfe v. M., etc., R. Co.*, 97 Mo. 473.) The case is one in which original evidence might and should have been obtained. (*Yates v. North*, 44 N. Y. 271; *Bennett v. Edwards*, 27 Hun, 352; *Whitney v. Hirsch*, 39 id. 325; *James v. Richardson*, Id. 399; Code Civ. Pro. § 844.)

Edward B. Hill for respondent. The order is not appealable. (*Liddel v. Paton*, 69 N. Y. 393; *Sartwell v. Field*, 68 id. 341; *Allen v. Meyer*, 73 id. 1; *Whittaker v. I. S. M. Co.*,

78 id. 621; *Buell v. Van Camp*, 119 id. 160.) The affidavit is sufficient. (*James v. Richardson*, 39 Hun, 399; *Laroton v. Reil*, 34 How. Pr. 465.)

GRAY, J. If the affidavit was insufficient, upon which this attachment was ordered, a question of law is presented and the order of the General Term is undoubtedly reviewable here. (*Allen v. Meyer*, 73 N. Y. 1; *Steuben County Bank v. Alberger*, 78 id. 252.) In this case, the writ was applied for upon statements made upon the information and belief of the deponent and the question is whether the information, concerning the material facts, appeared to have been acquired in such a manner as to justify the judge in acting upon it. Was the source of the information such as the judge could accept as satisfactory? The affiant, in such cases, is not required to have a personal knowledge of the facts required to be stated; but it is essential that his information must appear to have been competently derived; as otherwise the judicial officer, whose action has been invoked, is without jurisdiction to proceed. It is clear that the attorney in this case obtained his information by a communication made through the telephone upon the morning of the day upon which the complaint and affidavit were sworn to, and that his belief was based upon it, in making his statements concerning the facts constituting the cause of action, the absence of counterclaims, and the non-residence of the defendants. Those were the material facts required to be proved to the satisfaction of the judge and we do not think that the proof as to the source of the information concerning them was sufficient; for the reason that there was lacking any degree of certainty that the plaintiff himself ever made the communication to the affiant. There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice; or if it had appeared, in some satisfactory way, that he knew it was the plaintiff, who was speaking with him. None of these facts, however,

were averred. There was absolutely nothing, upon which the judge could pass, to show that it was the plaintiff who was speaking and not some undisclosed person, who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection, to which the invention of the telephone has been brought, has immensely facilitated the inter-communication of individuals at distant points and, inasmuch as the voice of the speaker is heard, in most, if not in all, cases, the identification of the speaker should be possible. The very facility of communication and of identification permits, and, therefore, imposes a duty upon, the party, who invokes judicial action upon the strength of information so received, to state his knowledge, or his grounds for believing, that it actually came from the party required to furnish it. To authorize an attachment to issue, upon the affidavit furnished here, was in disregard of the rule which requires that the source of information shall be disclosed in such a way as to enable the court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts. Judicial action upon such a source of information, as was here disclosed, was justified, below, by analogy with telegraphic communication. The analogy is incomplete. If the information comes through the telephone, it is quite possible to identify the speaker. Then, too, there is not, in the case of a telephonic communication, any record; like the message, which, in the case of the use of the telegraph, remains for reference and verification.

For these reasons, as well as for those stated in the opinion of Mr. Justice BARRETT, at Special Term, and of Mr. Justice VAN BRUNT, dissenting at the General Term, the order of the General Term should be reversed and that of the Special Term should be affirmed, with costs in all the courts.

All concur.

Ordered accordingly.

In the Matter of the Appraisal under the Collateral Inheritance Tax Act of Property of CLARISSA E. CURTIS, Deceased.

The will of C. created trusts for the benefit of her two daughters and two grandchildren named, each trust for the life of the beneficiary. The remainders were given one-half to such of her nephews, and one-half to such of her nieces named as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue, to such issue. *Held*, that the remainders were not liable to taxation under the Collateral Inheritance Tax Act of 1885 (Chap. 483, Laws of 1885) until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable, or to others in whose possession it would be exempt, as in case of the death of the nephews or of the nieces named prior to the expiration of the trust the one-half of the remainder would go to the heirs at law of the testatrix; also, that conceding there was upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate.

The intent of said law was to subject only real and beneficial interests to taxation, and when it is only in the chance of uncertain future events that such an interest will alight where it will be taxable at all, a delay until the contingency is solved is necessary and proper.

Reported below, 78 Hun, 185.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 6, 1893, which reversed in part, and in other respects affirmed, an order of the Surrogate's Court of the county of New York, assessing and fixing the collateral inheritance tax on property passing under the will of Clarissa E. Curtis, deceased.

The facts, so far as material, are stated in the opinion.

Edward Hassett for appellant. Under section 2 of chapter 483, Laws of 1885, the tax upon the remainders herein became due and payable immediately upon the death of the testatrix. (*In re Knoedler*, 140 N. Y. 380; *Crooke v. County of Kings*, 97 id. 449; *Freeborn v. Wagner*, 2 Abb. Ct. App. Dec. 178;

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143	194
143	334
142	219
147	75
142	219
149	549
142	219
152	100
142	219
158	9
142	219
154	114
142	219
171	53
142	219
172	77

Bailey v. Bailey, 28 Hun, 614; *Griffin v. Shepard*, 40 id. 355; 124 N. Y. 70; *Tracy v. Ames*, 4 Lans. 505; *Lakey v. Scott*, 15 Wkly. Dig. 148; *Einbury v. Sheldon*, 68 N. Y. 227; *Blanchard v. Blanchard*, 4 Hun, 287; 70 N. Y. 615; *Beardsley v. Hotchkiss*, 96 id. 213; *Bennett v. Garlock*, 79 id. 302.) There is not an equitable conversion of the real property into personal; an equitable conversion of land is worked by a positive direction to sell, or by an absolute necessity to sell in order to execute the will. (*Hobson v. Hale*, 95 N. Y. 589; *King v. King*, 13 R. I. 50; *In re Swift*, 137 N. Y. 77.) The remainders in both the real and personal property bequeathed to the nephews and nieces are vested remainders. (*Cook v. Cook*, 95 N. Y. 103; *Beardsley v. Hotchkiss*, 96 id. 201; *Manice v. Manice*, 43 id. 303; *Livingston v. Greene*, 52 id. 118; *Blanchard v. Blanchard*, 1 Allen, 227; *Everitt v. Everitt*, 29 N. Y. 39; *Teed v. Morton*, 60 id. 502.) The probability or possibility of the property of this estate, including the remainders, vesting by law absolutely in persons who would be exempt from taxation is too remote. (*Moehring v. Mitchell*, 1 Barb. Ch. 264; *Newell v. Nichols*, 75 N. Y. 78; *In re Enston*, 113 id. 174.)

Cortland Irving for respondent. It is submitted that these remainders are not liable at the present time to pay any collateral inheritance tax under chapter 483 of the Laws of 1885, because they are not vested, and the learned surrogate erred in holding them vested. (*Teed v. Morton*, 60 N. Y. 502; *Patchen v. Patchen*, 121 id. 432; *Shipman v. Rollins*, 98 id. 311, 327; *Delaney v. McCormack*, 88 id. 174, 183; *Drake v. Pell*, 3 Edw. Ch. 251, 268; *Leake v. Robinson*, 2 Merr. 387; 1 Redf. on Wills, 393; *Greenland v. Waddell*, 116 N. Y. 234; *Mullarky v. Sullivan*, 136 id. 227.) These remainder interests cannot be taxed at the present time because they are not beneficial. (*In re Enston*, 113 N. Y. 174.) These remainder interests cannot be taxed at the present time because there is no method known to the law by which their market value can be ascertained. They have no market value

now, nor did they have such value at the time of the death of the testatrix, and such taxation would be manifestly unjust. (*In re Stewart*, 131 N. Y. 274; *In re Cager*, 111 id. 347; Code Civ. Pro. § 2555; *L. S. & M. S. R. Co. v. Roach*, 80 N. Y. 339; *In re McPherson*, 104 id. 321; *Stuart v. Palmer*, 74 id. 183.) It is submitted that the executor and trustee has no power to sell these contingent remainders under the act, and that the order of the surrogate alone would not protect him from personal liability should he make such sale. (*Riggs v. Cragg*, 89 N. Y. 479; *Sipperly v. Baucus*, 24 id. 46; *Stilwell v. Carpenter*, 59 id. 414.)

FINCH, J. The testatrix, by the terms of her will, created a group of trusts for the benefit of her two daughters and two named grandchildren, each trust running for the life of the beneficiary; and then devised and bequeathed remainders over to such of her named nephews and nieces as should be living at the time of the successive termination of each of such trusts, or if any such beneficiaries should then be dead, to their then living issue. There was a power of sale given to the executors, but no explicit or imperative command to sell, and the intention of testatrix in that respect is left open to inference. The surrogate decreed that the remainders were liable to taxation under the Collateral Inheritance Act as it stood in 1885, and caused the values to be appraised and the amounts of the tax to be fixed. On appeal to the General Term that decree was reversed, the court deciding that the appraisal and assessment were premature, and from that decision the present appeal is brought.

I do not deem it necessary to discuss or determine the two difficult questions which were argued at the bar; first, whether the real estate of the testatrix is to be regarded as personal by force of an equitable conversion resulting from the provisions of the will; and second, whether the contingent limitations in remainder to the nephews and nieces vested in them at the death of the testatrix, subject, however, to be divested by their deaths before the termination of the trusts, or did

not vest at all until such last period, and only in the nephews and nieces or their issue then surviving: for in any view which may be taken of those questions there will always remain the one decisive fact, whatever may be the correct legal theory which describes and explains it, that until the end of the trusts it cannot be determined whether the property represented by the remainders will be taxable at all: that is to say, whether it will pass actually and beneficially to persons in whose hands it will be taxable, or to others in whose possession it will be exempt. If, in the end, these remainders go to the nephews and nieces a tax will be imposed, but if, instead of passing to them, the remainders should go to the children and grandchildren they would be exempt from taxation. Under this will, however we may speculate as to the technical location of the fee pending the running of the trusts, the actual and beneficial interest in remainder may pass wholly to the two daughters by intestacy. If, before the termination of the trusts, the two nieces, children of Edwin Racey, should die without leaving issue or issue living at the supposed date, the will would fail to operate upon one-half of the estate in remainder, and that would devolve at once upon the two daughters as heirs or next of kin. In like manner, if the three nephews should die without issue living, as one of them already has, the other half of the remainder would take the same direction; so that until the termination of the trusts it will be impossible to know whether the remainders are in truth taxable or not. Prior to that event the State cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable, and until it can show that vital and necessary fact its right to the tax cannot arise. A time will come, at the close of the trusts, when the question can be settled, and if then the property passes to the nephews and nieces the proper assessment can be made and collected.

The only possible answer is that made by the surrogate. He says that the remainders vested in the nephews and nieces at once upon the death of the testatrix and so became contingent interests taxable under the law. If that technical

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vesting be admitted, what so passed was rather a theoretical possibility than a tangible reality, for the life estate was in the trustee of the daughters carrying the whole beneficial use; there was no power over it in the contingent remaindermen; and the nominal and technical fee might never become a taxable estate. It was never intended by the law to tax a theory having no real substance behind it. As was said in *Matter of Swift* (137 N. Y. 86), the question of taxation is one of fact and cannot turn on theories or fictions. This case illustrates one result of the contrary doctrine. Walter Racey, a nephew named, has died without issue. He never took anything beneficial under the will and his estate can take nothing, and yet it is assessed for about one thousand dollars, which it is said will more than exhaust all that he left, and in return for which he received actually nothing and theoretically only an unsubstantial legal fabric. That is too unjust to be borne. I do not at all criticize the wisdom of the law which imposes a tax upon the succession of collaterals to estates which usually they did not help to earn and very often do not deserve. On the contrary, I deem the law thoroughly wise and just; but it does not at all follow that collaterals should be taxed upon property which they never received and upon what is in form but a theory and in fact only an illusion. The law itself gives abundant evidence in its language of the intent to subject only real and beneficial interests to taxation, and nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received. The surrogate seems to have rested his conclusion upon our recent decision in *Matter of Stewart* (131 N. Y. 277). The opinion in that case cannot be held in any respect to justify such a construction. It does decide that contingent interests although vesting in possession at a future day may be at once valued and assessed, and that such interests vesting in no specific beneficiary when the will takes effect cannot then be taxed, but come under the operation of the law when the event which locates and fixes them occurs. It may possibly be that where the only contingency of the future is upon which of several named per-

sons or classes of persons, all of whom are liable to suffer the taxation the beneficial interests will ultimately devolve, the appraisal and assessment need not be postponed, though even that is hardly a prudent construction, but need not now be discussed, yet where the contingency touches the taxable character of the succession, where it is only in the chance of uncertain events that the beneficial interests will finally alight where they will be taxable at all, a delay until the contingency is solved is both just and necessary.

This was substantially the view taken by the General Term, and it seems to me to be clearly right and just. It protects and preserves the interests of the devisees and legatees on the one hand, and the right of the State on the other.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

THE EMPIRE STATE TELEPHONE AND TELEGRAPH COMPANY,
Respondent, v. FRANK A. BICKFORD, Appellant.

While a court of equity may have jurisdiction of an action, brought by a principal against his agent, for an accounting as to property intrusted to defendant as agent, this does not make the action necessarily referable. The complaint herein asked that defendant account as to his transactions as agent for plaintiff in respect to these items: (1) Receipts and disbursements of plaintiff's moneys; (2) the conversion of personal property belonging to plaintiff and intrusted to defendant; (3) revenue lost to plaintiff by reason of defendant's neglect of his duties and his attempt to establish a competing business; (4) the proportion of the cost of equipment by plaintiff of a new place of business rendered necessary by defendant's wrongful acts and omissions. An order of reference was granted on motion of plaintiff. *Held*, error; that the first item was the proper subject of an accounting; that while the second might also be, it was not necessarily referable; that the other two items were not matters of account or of equitable cognizance; that the action should be treated as a whole, and so considered was an action at law and not one in equity. *It seems*, after the issues at law have been tried, if an accounting as to receipts and disbursements becomes necessary a reference may be ordered to take it.

Empire State Tel. Co. v. Bickford (72 Hun, 580), reversed.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 3, 1893, which affirmed an order of Special Term appointing a referee to hear and determine the issues in this action.

The nature of the action and the facts, so far as material, are stated in the opinion.

T. E. Courtney for appellant. The court has power to refer issues to hear and determine where the trial will require the examination of a long account and will not require the decision of difficult questions of law. (Code Civ. Pro. § 1013; *Townsend v. Hendricks*, 40 How. Pr. 143; *Dedricks v. Richley*, 19 Wend. 109.) When a party has a constitutional right of a trial by jury of one cause of action and it is joined with others, where he has no such right, a compulsory reference of the whole issues cannot be made. (*Ross v. Comber*, 5 J. & S. 289.) The character of the action must be determined from the complaint. (*Wood v. Hope*, 2 Abb. [N. C.] 186; *Untermeyer v. Beinhauer*, 105 N. Y. 521; *Verplank v. Kendall*, 13 J. & S. 525, 526.) Only actions upon a contract can be referred against the consent of the defendant. (*Silmsier v. Redfield*, 19 Wend. 21; 86 N. Y. 436; *Wickham v. Frazee*, 13 Hun, 431.) This action cannot be referred against the consent of the defendant. (*Clafin v. Drake*, 38 Hun, 144; *Camp v. Ingersoll*, 86 N. Y. 433; *Blake v. Harrigan*, 20 Civ. Pro. Rep. 424; *Mitchell v. Oliver*, 56 Hun, 208; *Reed v. Frazee*, 31 id. 286; *Johnson v. A. A. R. R. Co.*, 139 N. Y. 449; *McDonnell v. Stevens*, 9 Hun, 28; Penal Code, § 528; *Cassidy v. McFarland*, 139 N. Y. 201; *Vilmoe v. Scholl*, 61 id. 564.) There is no evidence that the trial will require the examination of a long account contained in the papers presented to the Special Term. (*Randall v. Sherman*, 131 N. Y. 669; *Thayer v. McNaughton*, 117 id. 111; *Lord v. Connor*, 48 How. Pr. 95; *Cain v. Delano*, 11 Abb. [N. S.] 29; *Knope v. Nunn*, 26 N. Y. Supp. 1074-1076; 75 Hun, 287; *Spence v. Simis*, 137 N. Y. 616.) The only evidence that this is an equitable action is contained

in the relief demanded by the plaintiff, and it is well settled that prayers for relief are no part of a complaint and of no force whatever, at least after an answer is put in. (Code Civ. Pro. § 1207; *Avery v. E. W. Co.*, 82 N. Y. 582-590; *Vibbard v. Françoise*, 5 Alb. L. J. 382; *Hoffman v. Treadwell*, 7 J. & S. 183; *Wheelock v. Lee*, 74 N. Y. 495.)

Underwood & Storke for respondent. The Special Term had power to make the order appealed from. (Code Civ. Pro. § 1013; *Marwin v. Brooks*, 94 N. Y. 71; *C. M. Co. v. H. M. Co.*, 44 Fed. Rep. 219; *Walker v. Spencer*, 45 N. Y. 71; *Marston v. Gould*, 69 id. 220; *Harrington v. Bruce*, 84 id. 103; *Austin v. Rawdon*, 44 id. 63; *People v. Wood*, 121 id. 522.) If the Special Term had power to make the order of reference the exercise of that power will not be reviewed here. (*Martin v. W. H. Co.*, 70 N. Y. 101; *Welch v. Darragh*, 52 id. 590; *Cassidy v. McFarland*, 139 id. 201.) The argument for the appellant assumes an erroneous theory of the nature of the action, viz., that it is a common-law action of tort. (*Robinson v. Smith*, 2 Paige, 222; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; 99 id. 185.)

Per Curiam. The plaintiff characterizes his action as one brought for an accounting by defendant in respect to his transactions as agent of the plaintiff in the management of its Cortland exchange, and the complaint specifies the particulars in which such accounting is asked, as follows:

(1) In respect to receipts and disbursements by defendant of money belonging to plaintiff between the years 1884 and 1893.

(2) In respect to the conversion of certain personal property belonging to plaintiff and intrusted to the possession of the defendant as part of the necessary machinery of the work to be done by defendant.

(3) In respect to the amount of revenue lost to plaintiff by reason of defendant's neglect of plaintiff's business, and by reason of defendant's attempts to establish a competing business at Cortland while in plaintiff's employ.

(4) In respect to the proportion of the cost of equipment of plaintiff's new exchange at Cortland, made necessary by defendant's wrongful acts and omissions properly chargeable to defendant. Among such is the alleged procurement of a renewal lease in his own name of the premises formerly leased to plaintiff.

The first item is a proper subject for an accounting, and possibly the second, treating it as misconduct of an agent in relation to property intrusted to him by his principal by reason of which the whole or part of the value of such property has been lost to the principal. Such second item is not, however, on that ground referable. An action to call an agent to account for his conduct may be cognizable in equity without being also referable. If it have to do with conduct as to property intrusted to defendant as agent, equity might have jurisdiction and yet no case for a reference be made out. But the other two items of alleged damage do not constitute an account as that word is used in the statute. They involve an inquiry as to damages which plaintiff has sustained by reason of alleged misconduct by defendant while its agent. Such misconduct was not in regard to property of the plaintiff, but on account of defendant's alleged negligence in attending to his duties, viz., a neglect of plaintiff's business and his wrongful acts in attempting to establish a competing business.

A recovery is also sought for the expense plaintiff has been put to in equipping its new exchange, caused by the wrongful act of the defendant in taking the lease as above stated.

These are not matters of account and are not properly cognizable in an equitable action. They are not connected with the receipt or disbursement of money of the principal, nor with any fraudulent or other omission of the defendant to charge himself with moneys received by him, or paid out by him, and wrongfully charged to his principal.

We think the chief part of the action is of a common-law nature, and it should be treated as a whole and as charging but one cause of action, and that an action at law and not one

in equity. After the issues at law are tried, if it then become necessary to have an accounting as to the receipts and disbursements, a reference can be ordered to take it.

The questions as to whether the defendant has been guilty of any wrongful acts, and the amount of damages (if any) caused thereby under the second, third and fourth items above stated, and whether there has been a settlement and release or not, should be tried by a jury, unless both parties consent to some other mode of trial.

The order of reference should, therefore, be reversed, with costs to defendant in all courts, and the motion for a reference denied, with costs.

All concur.

Ordered accordingly.

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THE PEOPLE EX REL. THE PRESS PUBLISHING COMPANY, Appellant, v. JAMES J. MARTIN et al., as Police Commissioners, etc., Respondents.

Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of the nominations for offices to be filled at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city; in making the selection the board acts judicially, and its action may be reviewed by certiorari.

The publisher of a paper not selected, claiming to have the largest circulation, has sufficient interest to institute proceedings by certiorari.

While said board may not, under the act, arbitrarily designate the newspapers without making any inquiry or effort to obtain the best information as to their circulation, but must act in good faith and seek for information, they are not bound to resort to any particular evidence or to give to the various newspaper representatives a formal hearing.

In proceedings by certiorari to review the action of said board in making such a selection, these facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator with a request that *The World*, the newspaper published by it, should be selected, which affidavit stated that the circulation of said newspaper exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners in substantiation of its claims. No other com-

munication was had between the relator and the board until after the selection was made. Thereafter relator presented to the board an affidavit to the effect that the circulation of *The World* in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claim; this request the board denied, and refused to re-consider the decision made. In their return to the writ the police commissioners alleged that in making the designation they selected the newspapers which, according to the best information they could obtain, had the largest circulation within the city. *Held*, there was nothing in the record showing that the determination of the board was erroneous, as at the time of the designation it had been furnished with no evidence that *The World* had a larger circulation in the city than any other newspaper; that its circulation might be larger in the whole country, as stated in the first affidavit, but not as large in the city, and the second affidavit and offer came too late; that the court was bound to take the return as true, and it showed a full compliance with the statute.

It seems, if the return is evasive or not sufficiently full, the relator could have compelled a further return (Code Civ. Pro. § 2135), but having elected to stand upon the return as made it was to be taken as true.

Reported below, 72 Hun, 354.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 13, 1893, which confirmed a determination of the board of police commissioners of the city of New York, designating certain newspapers for the publication of election notices, which proceedings were brought up for review by certiorari.

The Election Law of 1892 provides for the publication of the list of candidates to be voted for at any general election. The relator is the publisher of the New York World, and in the fall of 1892 it claimed that it was one of the papers published in the city of New York in which the lists of nominations of candidates should be published as required by that law; and on the 6th day of September an affidavit was made by its business manager, in which it was stated that the World was published in the city of New York; that it advocated the principles of the political party which at the last preceding election cast the largest number of votes in the state of New York, and that its daily circulation exceeded by

many thousands that of any other newspaper published in the United States; and the affidavit contained a statement that the relator was ready at any time, upon demand, to submit to the police commissioners or any one designated by them, in substantiation of its claims, all its books and accounts relating to its circulation. The affidavit was on the day of its verification delivered to and left with the police commissioners, with a letter signed by the business manager of the World, notifying them that it should be designated for the publication of all election notices for the reasons stated in the affidavit. From that time to the 25th day of October following, there does not seem to have been any communication between any representative of the World and the police commissioners; and on the latter day at their meeting its business manager again appeared before them and requested them to allow him to produce evidence, proving that the circulation of that paper in the city of New York was larger than that of any other daily newspaper published in the city, and that its circulation was 75,000 in excess of the Sun and the Daily News. But the board would not allow him to produce such evidence. Before he appeared there, and before the request was made by him, the board had designated the New York Sun and the New York Daily News as representing the Democratic party, and the New York Tribune and the Press as representing the Republican party.

Thereafter, on the 2d day of November, the relator applied for a writ of certiorari to review the determination of the police commissioners in designating the papers named, and in its verified petition for the writ it alleged the facts hereinbefore stated, and further, that the letter and affidavit of the relator's manager of September 6th were before the commissioners at the time of the designation of the other papers, and that no other affidavit was at that time before them; that they did not obtain the best information that they could relative to the papers having the largest circulation within the city, and that they did not obtain any such information as a board other than that furnished by the affidavit of the relator's man-

ager, and that none of the newspapers designated had the largest circulation within the city of New York. The commissioners made return to the writ, in which they admitted that there was left at their office in the city of New York the letter and affidavit hereinbefore mentioned, and that they designated for publication of the lists of candidates the Sun, News, Tribune and Press; and they averred that on the 25th day of October, 1892, the only written papers in regard to the subject-matter before them were the letter and affidavit before mentioned; that at the time of the passage of the resolution designating the four papers no one appeared for the relator to substantiate the statements contained in the letter and affidavit; that after the resolution designating those papers had been adopted the manager of the World requested to be heard and was heard, but did not produce any witnesses or further evidence, and they declined to reconsider their action; that in designating the papers for the publication they selected those which, according to the best information they could obtain, had the largest circulation within the city and county of New York.

Upon the affidavit upon which the writ was issued, and the return to the writ, the General Term affirmed the determination of the board of police commissioners, and this appeal is from the decision of the General Term.

John M. Bowers for appellant. The writ of certiorari to review will issue when the writ would have issued at common law, and the right to the writ, or the power to issue it, has not been taken away by statute, when the determination is final, and when there is no appeal from such determination to a court, or review of it by any body, or officer, and when no rehearing is expressly provided for by statute. (Code Civ. Pro. §§ 2120, 2122.) In addition the action sought to be reviewed must be judicial. (*People ex rel. v. Board*, 33 Barb. 344; *People ex rel. v. Mayor*, 2 Hill, 9; *People ex rel. v. Common Council*, 78 N. Y. 33, 39; *People ex rel. v. McLean*, 62 Hun, 45; 1 Ld. Raym. 580; 1 Salk. 146; *Lavo-*

ton v. Commrs., 2 Caines, 182; *Wildy v. Washburn*, 16 Johns. 49; *People v. Judges*, 24 Wend. 249; *People ex rel. v. Van Alstyne*, 32 Barb. 131.) The court must inquire into the facts as well as to the jurisdiction, to see whether the determination was supported by evidence or was against the preponderating weight of evidence. (Code Civ. Pro. § 2140; *In re People v. Board of Assessors*, 39 N. Y. 88; *People ex rel. v. Van Alstyne*, 32 Barb. 131; *People ex rel. v. Smith*, 45 N. Y. 772; *People ex rel. v. Eddy*, 57 Barb. 593; *People ex rel. v. Bd. of Police*, 39 N. Y. 506; *People ex rel. v. Bd. of Police*, 72 id. 415.) In any case we submit that the court will review the determination of the inferior tribunal, even though the judgment of such tribunal is void or rescinded by it, in order that the relator's rights may be determined. (*People ex rel. v. Canal Board*, 7 Lans. 220; *People v. Judges*, 24 Wend. 249; *People ex rel. v. Board*, 16 Wkly. Dig. 390; *People ex rel. v. Jones*, 112 N. Y. 597.) The courts, by means of certiorari, will exercise a salutary influence and superintendence over inferior jurisdictions, from whose decisions there is no appeal. (*Lawton v. Comrs.*, 2 Caines, 179, 182; 1 Ld. Raym. 580.) The board of police commissioners acting under the statute should have acted upon legal evidence as the best information it could obtain. (*People ex rel. v. Troy*, 78 N. Y. 833; Code Civ. Pro. §§ 843, 854.) The relator has such a personal interest in the publication of the lists of nominations that it can maintain a proceeding in its name to review a determination designating newspapers for such publication. (*In re Sullivan*, 55 Hun, 285.) As it appears from the face of the return that the only evidence before the board was introduced on behalf of the relator and required the selection of the newspaper published by it for the publication of the lists of nominations, and as, by the return, no other evidence is set out from which a finding could be made, it follows that the determination of the board in designating newspapers other than that published by the relator should be annulled. (*Mullins v. People*, 24 N. Y. 399; *People ex rel. v. Overseers of Ontario*, 15 Barb. 286;

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People ex rel. v. Board of Police, 39 N. Y. 506; *People ex rel. v. Howland*, 61 Barb. 273.)

D. J. Dean for respondents. The appeal should be dismissed upon the ground that no question of practical importance is now involved in the controversy. (*People ex rel. v. Squire*, 110 N. Y. 666; *People ex rel. v. Walter*, 68 id. 403; *People ex rel. v. Phillips*, 67 id. 582; *Ex parte Hetz*, 111 U. S. 766.) The police commissioners in this case acted as ministerial officers and not as a judicial body, so that their action cannot be reviewed on a writ of certiorari. (*People ex rel. v. Jones*, 112 N. Y. 597; *People ex rel. v. Suprs. Queens Co.*, 131 id. 468; *People ex rel. v. Walter*, 68 id. 403; *I. P. Co. v. Harris*, 62 Iowa, 501; *Smith v. Yoram*, 37 id. 98; *Atty.-Genl. v. Mayor, etc.*, 143 Mass. 589.)

EARL, J. In the Election Law, chap. 680, sec. 61, it is provided that, at least six days before an election to fill any public office, the board of police commissioners of the city of New York shall cause to be published in not less than two, nor more than four newspapers within such city, a list of all nominations for candidates for offices to be filled at such election, and that "one of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the largest number of votes in the state; and another of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election cast the next largest number of votes in the state. The clerk or board, in selecting the respective papers for such publication, shall select those which, according to the best information he can obtain, have the largest circulation within such county or city. In making additional publications the clerk or board shall keep in view the object of giving information, so far as possible, to the voters of all political parties; and in no event shall additional publications be made in two newspapers representing the same political party."

The relator is right in claiming that the police commissioners in designating the newspapers act judicially; that their determination may be reviewed by writ of certiorari, and that the relator had sufficient interest to institute this proceeding; and while the time has long since passed when any decision in this matter can have any practical, efficient operation, we will, in view of the public importance of the questions involved, overlook that circumstance and proceed to the determination of the matter upon its merits upon the facts as they appear in this record.

The police commissioners cannot, under this act, arbitrarily designate the newspapers without making any inquiry or any effort to obtain the best information as to their circulation. They must act in good faith and seek for information as to the circulation of the newspapers, and in making the designation they must act according to the best information they can obtain. But they are not bound to resort to any particular evidence nor to give the various newspaper representatives a formal hearing. They can receive affidavits, examine books or make other inquiries satisfactory to them for the purpose of ascertaining which of the newspapers has the largest circulation within the city. If they are furnished with formal proof by the representatives of any newspaper, they should receive it and act upon it. If evidence, not open to suspicion or doubt or question, is furnished to them showing that any particular newspaper has the largest circulation, they should receive and act upon such evidence, giving to it its proper force and effect. In other words, they should act fairly, seeking for the best information to guide them in the exercise of their judicial discretion in the selection of the newspaper under the act. All sources of information are open to them as they are open to assessors of property for taxation who are to proceed upon diligent inquiry and the best information they can obtain. (2 R. S. [7th ed.] 990, 991, 994; *People v. Trustees of Ogdensburgh*, 48 N. Y. 390.)

Now, what facts have we here? At the time the police commissioners designated the newspapers they had not been

furnished with any evidence by the relator that the World had a larger circulation in the city of New York than any other newspaper. The entire circulation may have been larger than that of any other newspaper in the whole country, and yet its circulation may not have been so large in the city of New York as some other newspaper published there. The offer of the relator on the 25th of October, then to show that the circulation of the World in the city of New York was larger than that of any other newspaper, came too late, as the designation had then already been made. There is absolutely nothing in this record showing that the determination of the police commissioners was erroneous, or from which we can determine that they did not exercise their jurisdiction regularly and rightfully. We are bound to take their return as true, and in it they allege that in designating the papers they selected those which, according to the best information they could obtain, had the largest circulation in the city of New York; and thus they certified that they had actually and literally complied with the statute. If the return was evasive, or not sufficiently full, they could have been compelled, under section 2135 of the Code, to make a further return. They could have been required to return what action they took and what information they sought and obtained in reference to the circulation of the newspapers. But, instead of asking for a further return, the relator was content to stand upon the return as made. We are bound to take the return here as absolutely true. If it be false the relator has its remedy by an action against the police commissioners for making a false return, in which action it can recover its damages suffered in consequence thereof. (*People ex rel., etc., v. Fire Commissioners*, 73 N. Y. 437.)

Therefore, because we cannot in this record discover any error in the proceedings or determination of the board of police commissioners, the order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

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j172	1282
j172	*282
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j172	*282
142	236
77 AD	175

EDWARD M. STECK, Respondent, v. THE COLORADO FUEL AND
IRON COMPANY, Appellant.

The question as to whether an action is referable without consent of both parties is to be determined from the complaint alone. If the cause of action there set forth is not referable without consent and the same is put in issue, defendant is entitled to trial by jury, and the action is not made referable by anything set up in the answer. (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting.)

Where, therefore, the complaint in an action set forth a cause of action on contract and this was put in issue by the answer, which also set up counterclaims consisting of long accounts, *held* (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting), that an order of reference of all the issues, granted on motion of plaintiff against the objection of defendant, was error.

The history of legislation upon the subject of set-off and references given. *Hall v. U. S. R. Co.* (14 Wkly. Dig. 48; *affd.*, 88 N. Y. 655), distinguished.

(Argued January 29, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 12, 1894, which affirmed an order of Special Term, which granted a motion for a reference and appointed a referee.

The facts, so far as material, are stated in the prevailing opinion.

James Stikeman for appellant. Trial by referee is an exceptional mode of judicial procedure, and when it is sought to coerce a suitor into a submission to it the burden is upon the party applying for a reference to show that the case is within the excepted class. (*Cassidy v. McFarland*, 139 N. Y. 201.) It is not enough to justify a compulsory reference that the case may involve the examination of a long account. It must be shown that the trial will involve such examination. (*Thayer v. McNaughton*, 117 N. Y. 111; *Spence v. Simis*, 137 *id.* 616.) The counterclaims in no case involved an account. (*Untermeyer v. Beinhauer*, 105 N. Y. 521.) The referable quality of an action must be determined from the

complaint and a counterclaim set up in the answer cannot change it. (Laws of 1848, chap. 379, § 226.)

William C. Camman for respondent. The question whether the examination of a long account is necessarily involved in the action is not appealable to this court. (*Welsh v. Danagh*, 52 N. Y. 590; *Martin v. W. H. Co.*, 70 id. 101; *Harrington v. Bruce*, 84 id. 103.) The facts before the court below fully warranted the finding that the trial of the issues will require the examination of a long account within the meaning of section 1013 of the Code. (*Cassidy v. McFarland*, 139 N. Y. 206.) The examination of the account is directly in issue and will be necessary upon the trial. (*Thayer v. McNaughton*, 117 N. Y. 111; *Spence v. Simis*, 137 id. 616; *Camp v. Ingersoll*, 86 id. 433; *Clafin v. Drake*, 38 Hun, 144; *C. Ins. Co. v. P. Ins. Co.*, 8 N. Y. Supp. 524.) The referable quality of the action depends upon the issues presented by the complaint and answer. (*Maryott v. Thayer*, 7 J. & S. 417; *Thayer v. McNaughton*, 117 N. Y. 111.)

EARL, J. The plaintiff's cause of action, as alleged in his complaint, is for his salary as general manager of the defendant at a stipulated price for the quarter of the year ending December 31, 1892. The verified answer of the defendant gainsays and puts in issue all the material allegations of the complaint, and alleges counterclaims consisting of long accounts. It is conceded that if the plaintiff's cause of action had been merely put in issue by the answer, the action could not have been referred without the consent of both parties, and that either party demanding it would have been entitled to a jury trial. But the contention of the plaintiff is that because the counterclaims involve long accounts, therefore, the action may be compulsorily referred and all the issues therein tried before a referee. The question is thus presented again to this court whether, where the cause of action alleged in the complaint is not referable, the action can be made referable by anything which appears in the answer. We have

several times answered this question in the negative, and we should do so again.

As it is sought to distinguish this case from our prior decisions, to which I will hereafter refer, and as we differ among ourselves, it becomes important, more particularly than ever before, to examine the grounds of those decisions, and to give somewhat fully the reasons for our present conclusion.

It was provided in the State Constitution of 1777 that "trial by jury in all cases in which it has heretofore been used in the colony of New York shall be established and remain inviolate forever," and that provision is contained in all the revisions of our Constitution since that time. We have, therefore, to determine whether such an action as this could, prior to 1777, have been referred to a referee for trial without the consent of the parties. References of actions pending in the common-law courts for trial before referees were not known to the common law, and, so far as they are now authorized, they are particularly provided for by statutes. Under the Dutch rule in the colony of New York actions involving long accounts could be referred to arbitrators or referees, and such a reference was a very common mode of trial during that period. But it was not pleasing to the English colonists, who had received the trial by jury from their ancestors, a priceless heritage secured by Magna Charta, and hence, some years after the capitulation of the Dutch to the English in 1683, by the Charter of Liberties and Privileges granted by the Duke of York to the inhabitants of New York, it was provided "that all trials shall be by the verdict of twelve men." (See Charter, appendix No. 2, 2 Laws of 1813.) Thereafter all actions in the common-law courts of the colony were triable before juries, except the action of account, and that was applicable only to a limited class of cases involving the examination and taking of accounts. It was one of the most difficult, dilatory and expensive actions known to the law, and was very rarely resorted to. (*Rawson v. Rawson*, 3 Hill, 59; *Magown v. Sinclair*, 5 Daly, 63.) The difficulties attending the prosecution of such an action were such that the practice

became general for merchants and others having long accounts to enforce their collection by actions of assumpsit, which were always then triable by jury. But the embarrassments attending the trial of such actions by jury were such that, December 31, 1768, an act (2 Van Schaick's Laws of New York, 517) was passed, with a preamble as follows: "Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attainments; and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it, therefore, enacted, etc., that whenever it shall appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule, to be made at discretion, to referees, * * * and if the report or award of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same, with a *relicta verificatione*, as by confession with costs, if by law the plaintiff would have recovered costs, had a verdict passed in the same cause for the sum so reported to be due; but if, after payment pleaded, any sum shall be reported to be due to the defendant, and the award be confirmed, he shall have judgment and recover his costs. * * * And when

such referees shall report that nothing is due from the defendant, and the report be confirmed, then judgment shall be entered as by *non pross*, and the defendant shall recover his costs, to be taxed, and such judgment be a perpetual bar." That was the first act in the colony of New York authorizing a reference in any common-law action. It was undoubtedly a tentative act, and it expired by its own limitation on the first day of January, 1771. It was revived and re-enacted by the act of February 16, 1771, and was to continue in force until February 1, 1780. It is evident that the people of this state parted with the trial by jury in any case with great hesitation and reluctance, as the temporary statute authorizing references was not re-enacted in 1780, and there was no such statute in this state from that date until 1788, when it was again substantially reinstated. It was in force prior to and at the time of the adoption of the Constitution of 1777, and the question for our determination is whether, under it, such an action as this could have been referred. And I think it is very clear that it could not have been. The preamble to the act may be read for the purpose of ascertaining its meaning and scope, and from that it clearly appears that the lawmakers were then dealing with actions brought by merchants and others upon long accounts; that it was such actions only that were intended to be provided for, and that such actions only were intended to be sent to referees for trial. The provision is that an action could be referred when the trial would "require an examination of a long account, either upon the one side or the other," and, therefore, it may be conceded that when the trial would involve the examination of a long account, under the practice as it then existed, upon either side, a reference could be ordered. But when I have made this concession little progress has been made. We must determine under what circumstances a long account could appear in the answer of the defendant, so as to make the action referable when a long account was not set forth in the complaint, and that makes it necessary for us to examine the ancient law of set-off.

Set-offs in common-law actions were unknown to the common

law. If a defendant had accounts or claims against the plaintiff he could enforce them only by an action commenced by him against the plaintiff. Even if the plaintiff's accounts or claims were undisputed, and the defendant had accounts or claims against the plaintiff far in excess of those made against him, he could not offset them, but was obliged to enforce them by an independent action. That practice was not changed in England until the acts 2 and 8 of George the Second, whereby set-offs were first authorized there. (3 Black. Com. 305; Barbour on Set-off, 24.) They were authorized several years earlier in the colony of New York by the act, chapter 281 of the Laws of 1714. (Vol. 1, New York Colonial Laws, Livingston & Smith's edition, 106.) In that act it was provided, "that if any two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts or the like, and one of them commence an action in any court of this colony, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the debt or sum demanded, giving notice in writing with the said plea of what he will insist upon at the trial for his discharge, and give any bond, bill, receipt, account or bargain so given notice of in evidence, and if it shall happen that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ and shall pay the costs; and if it shall appear that any part of the sum demanded is paid, then so much as is found to be paid shall be discounted and the plaintiff shall have judgment for the residue only, with costs of suit; but if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted, or in arrear to the defendant more than will answer the debt or sum demanded; and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record," etc. That was the only law upon the subject of set-

off enacted in the colony previous to the Constitution of 1777. At that time, and, I believe, at all times prior to the Code practice, notice of matter in defense could not be given except in connection with some plea. The lawyers of that period could not conceive of a defense except under some plea, and at no time in this state, prior to 1801, could there be more than one plea to a declaration. The pleadings on both sides were required to be such as to present for trial a single issue, and a pleading tendering several issues was bad for duplicity. (1 Chitt. Pl. 259, 264, 592.) Under the act of 1714 the defendant could give notice of his set-off only with the plea of payment, and with no other plea, and under his plea of payment he could prove no payment except that accomplished by his set-off. There could not be two distinct issues, one upon the payment and the other upon the set-off, and under the plea of payment, with notice of set-off, the only matter that could be litigated was the set-off. A plea of payment, as well as a plea or notice of set-off, always admitted the plaintiff's claim. They were pleas of confession and avoidance. (Jacobs' Law Dic. and Tomlins' Law Dic., tit. Set-off; 2 Parsons on Con. 734; 2 Black. Com. 305.) A set-off is defined to be "a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance it, either in whole or in part." Blackstone, at the page cited, says: "To this head may also be referred the practice of what is called a set-off, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but on the other sets up a demand of his own to counterbalance that of the plaintiff, either in the whole or in part, as if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he pleads such set-off, must pay the remaining balance into court." In 2 Parsons on Contracts, page 734, it is said: "Set-off has been well defined as a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a

demand of his own against the plaintiff to counterbalance it in whole or in part." And again, at page 741, it is said: "The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but a part or the whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him."

So, under the act of 1714, it was not possible for the defendant to give notice of his set-off and at the same time dispute the plaintiff's claim. He could not have done so, even if the statute had not expressly provided that he could give notice of his set-off only in case he was not able to gainsay the plaintiff's claim. His plea of payment with notice of set-off necessarily confessed the claim. If the words "cannot gainsay," etc., did not condition the right of set-off, then they were absolutely without meaning, and no purpose for their use can be plausibly suggested or even conceived. Besides this express limitation, the whole framework of the statute shows that the right of set-off was limited to cases where the plaintiff's claim was not in dispute, as the set-off was to be allowed — not against the claim or debt of the plaintiff found or established or actually existing — but against "the debt or sum demanded." These words quoted are not found in the English Statutes of Set-off, but are found in all the statutes upon the subject in this state until the Revised Statutes, when they, as well as the words "cannot gainsay," are for the first time omitted. The statute of 1714 was re-enacted, slightly changed, February 27, 1788, in the act "for the amendment of the law and the better advancement of justice," and again the defendant, in case he could not gainsay the plaintiff's claim, was allowed, with the plea of payment, to give notice of set-off. By the act, chapter 90 of the Laws of 1801, a general practice act under the same title, it was provided that the defendant, in case he could not gainsay the plaintiff's claim, could plead the general issue instead of payment as before, and with that give notice of set-off. It was also provided in that act, for the first time

in this state, that "it shall be lawful for any defendant or tenant in any action in any court of record to plead the general issue and to give any special matter in evidence which, if pleaded, would be a bar to such action, giving notice with the said plea of the matter or several matters so intended to be given in evidence;" and also, "that it shall be lawful for any defendant or tenant in any action, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters as he shall think necessary for his defense." All these provisions were carried into the Revised Laws of 1813, including the provision allowing the defendant, if he could not gainsay the plaintiff's claim, with the plea of the general issue to give notice of his set-off; and so the law remained until the Revised Statutes. Under these acts of 1801 and 1813 it was held that the notice of set-off could only accompany the general issue and no other plea, as before it could only accompany the plea of payment (*Alsop v. Caines*, 10 John. 396; *Caines v. Brisbane*, 13 id. 9; *Root v. Taylor*, 20 id. 137; *Wheeler v. Raymond*, 5 Cowen, 231.)

Under these acts, what was meant by the words "if the defendant cannot gainsay" the plaintiff's claim? They are not found in any statute of set-off in England or elsewhere in this country. Did the lawmakers in 1801 and 1813 mean to change the prior practice which had obtained when the notice of set-off was allowed with the plea of payment? Did they mean to deprive these words, which before had a meaning, of all meaning? Did they mean to permit the defendant to gainsay the plaintiff's claim when he was unable to do it? I believe they did not. They had not yet reached the stage of law reform which allows several actions to be tried in one. They were evidently not convinced of the wisdom and feasibility of allowing the defendant to litigate the plaintiff's claim and his own independent claims at the same time and in the same action; and I do not believe that such a practice ever obtained in this state prior to the Revised Statutes. The lawmakers allowed the notice of set-off to go with the general

issue because under that, as under the plea of payment, the defendant could show payment. The general issue was a mere formal plea to sustain or give place for the notice of set-off, and not to authorize the defendant to litigate or dispute the plaintiff's claim upon the trial. I have not overlooked the cases of *Gordon v. Bowne* (2 Johnson, 150); *Burgess v. Tucker* (5 id. 105); *O'Callaghan v. Sawyer* (Id. 118); *Tuttle v. Beebe* (8 id. 152); *Root v. Taylor* (20 id. 137); *Bridge v. Johnson* (5 Wendell, 342). In none of these cases was it held that the defendant could avail himself of his set-off upon the trial and at the same time dispute and litigate the plaintiff's claim. The only case which has come to my attention which gives any countenance whatever to such a practice is that of *Gordon v. Bowne*, where the question upon the plaintiff's claim was one of law upon undisputed facts, and the decision there proceeded upon the ground that the set-off was not proper; and it was never held in any reported case that the words "cannot gainsay," etc., did not have the meaning and force which I have attributed to them. But whether I am mistaken or not as to the meaning of these words when the notice of set-off accompanied the general issue, is of no importance, as I cannot be mistaken as to their meaning when the notice of set-off was required to accompany the plea of payment only.

It was provided in 2 George II, chapter 22, section 13, that "where there are mutual debts between the plaintiff and defendant, * * * one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the defendant is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon the general issue." This clause was made perpetual by the act, 8 George II, chapter 24, section 4, and it having been doubted whether mutual debts of a different

nature could be set against each other, that doubt was removed by section 5, which authorized the set-off, notwithstanding the debts were deemed in law to be of a different nature; and it was provided that when the debt due to the defendant was less than that due from him, he must, on pleading such set-off, pay the remaining balance into court. Under the English statutes it was held that notice of set-off could be given only with the general issue. (1 Chitt. Pl. 606.) As I have before stated, there was no provision in the English statutes allowing the defendant to give notice of his set-off only in case he was not able to gainsay the plaintiff's claim; and some years before the passage of these acts, by the statutes of 4 and 5 Anne, it was provided, as afterward in this state in the acts of 1801 and 1813, that the defendant could, with the leave of the court, plead as many matters to the declaration of the plaintiff as he should think necessary for his defense. In drafting the act of 1801, which was carried into the act of 1813, the lawmakers here had before them the English statutes; and why did they continue the provision that the defendant could give notice of his set-off only in case he could not dispute the plaintiff's claim, if it was to have no meaning and effect, and if the statutes here were to have the same operation as the English statutes?

This review of the statutes shows clearly that prior to 1777, and for many years thereafter, a defendant was not permitted to set off his claims against the plaintiff's claims, except he admitted them. The provision for set-offs took this limited form to meet the obvious injustice of a case where the defendant was not able to gainsay the plaintiff's claims, but yet had set-offs sufficient in whole or in part to pay and discharge them; and thus it is clear that prior to that period there was no possible way of depriving the plaintiff of a trial by jury in case his cause of action was gainsaid.

There can, therefore, be absolutely no ground for saying that these accounts in this answer which disputes and gainsays the plaintiff's claim, could prior to 1777 have been set up as a defense to the action, or that prior to that time there was

any possible way for depriving the parties of a jury trial upon the issues formed upon the plaintiff's cause of action.

It would not be useful now to examine more particularly the statutes as to set-offs and references enacted since 1777, as there has been no power in the legislature since that time to curtail the right of trial by jury. It could not do so by changing the form of pleadings, or by allowing set-offs and counter-claims where they could not have been interposed prior to that time. In the acts of 1788, 1801 and 1813, and in the Revised Statutes and the Code, the power to refer actions is continued in substantially the same language as that used in the act of 1768; and in the Revised Statutes, for the first time, as I believe, was the defendant enabled to plead or give notice of a set-off, and at the same time put in issue and contest upon the trial the cause of action alleged in the declaration. I can safely assert that prior to the Revised Statutes there is no record in any book of any cause compulsorily referred where the complaint stated a disputed cause of action not involving the examination of a long account. I have examined all the old works on practice, and all the earlier reports, and have found no trace or hint of a practice that would authorize a reference in such a case as this; and since the adoption of the Revised Statutes and the introduction of the Code practice I am confident there is no reported decision of any court of this state which sanctions the reference of an action merely because the answer involves a long account, when, upon the cause of action alleged in the complaint standing by itself, either party could demand a jury trial, except the decision in the court below in this case, and in the cases where, upon appeals to this court, the decisions of the lower courts were reversed.

If it should be asserted that the right of trial by jury had, by the practice and usage of the courts, become curtailed prior to any of the modern revisions of the Constitution so as to give the meaning of the guaranty as to jury trial a more limited scope than it had in the Constitution of 1777, I answer that the assertion is unfounded.

I will now call attention to some decisions in this court. In *Townsend v. Hendricks* (40 How. Pr. R. 143) the action was to recover back certain bonds and money obtained from the plaintiff by the fraudulent representations of the defendant, and to that action the defendant interposed a counterclaim requiring the examination of a long account. That case was literally within the law as to references, as it did involve the examination of a long account upon one side, and yet, after a careful consideration of the case, in the first opinion written by the late Judge RAPALLO in this court, it was held that the action was not referable. In that opinion it was said: "It is further contended that the defendants have, by interposing a counterclaim consisting of a long account, rendered the examination of such account necessary. It does not follow that the action can be referred for that reason. If the action is from its nature not referable, the answer cannot make it so. Should the counterclaim ever require examination, a reference can be ordered as to it after trial of the issues." There the cause of action alleged in the complaint was such that prior to 1777 a long account could not have appeared in the answer, and hence the action could not have been referred, and both parties would have had the right to a jury trial, and hence no subsequent legislation could take away that right. In *Welsh v. Darragh* (52 N. Y. 590) the action was upon contract for the sale and delivery of various articles of merchandise, and the cause of action alleged in the complaint would require the examination of a long account. The answer set up fraud in the transaction, and claimed damages by way of recoupment or counterclaim; and there, Chief Judge CHURCH writing the opinion, again announced the doctrine, that the character of the action is determined by the complaint, and if that allege a cause of action upon contract involving a long account, the action is referable, and that although the answer sets up fraud in the transaction and claims damages by way of recoupment or counterclaim, that does not change the character of the action, or render it non-referable; and there the order of reference was

affirmed, as the complaint made the action referable under the act of 1768. The question again came before this court in *Untermeyer v. Beinhauer* (105 N. Y. 521). There the cause of action alleged in the complaint was for the recovery of unliquidated damages for breach of contract, and in no sense involved an account. The answer contained a counterclaim, which required the examination of a long account, and the court again held, Judge RAPALLO writing the opinion, that as the cause of action alleged in the complaint was not referable, it could not be made so by the counterclaim. In the opinion he referred to the language above quoted, which he used in the case of *Townsend v. Hendricks*. Why was not that action referable? It involved the examination of a long account on one side, and thus the case was literally within the language of the act of 1768. The answer is very plain. It was not an action upon a long account; the cause of action alleged in the complaint was not referable; it was put in issue, and, therefore, although the defendant set up a counterclaim containing a long account, as he had the right to do, the action was not thereby made referable, and the defendant did not lose his right to demand a jury trial. When he put in issue the plaintiff's cause of action, if for no other reason, a case was made which could not have been referred under the act of 1768. In *Cussidy v. McFarland* (139 N. Y. 201, 205), MAYNARD, J., said: "It is sufficient, if the fact clearly appears from the verified pleadings, that the examination of a long account will be involved in the trial of the issues. The referable quality of the action must alone be determined from the complaint." In New Jersey the law authorizes the reference of "all actions in which matters of account are in controversy," and in *Gopsil v. Hervey* (34 N. J. Law, 435) it is said "that it is the character of the plaintiff's claim which determines whether the case is referable." In *Hall v. United States Reflector Co.* (14 N. Y. Week. Dig. 48; 95 N. Y. 648, and 96 id. 629) the plaintiff's cause of action was expressly

admitted and the litigation was over matters alleged in the defendant's answer, which, in any view of the case, involved long accounts.

The construction I give to the acts of 1714 and 1768 is neither narrow nor technical. It is dictated by the spirit of the times in which those acts were in force, when there was greater reverence for trial by jury than exists now, is required by their letter and spirit, leads to no absurd or inconvenient results, and is, as I believe, in harmony with the established practice of the courts for more than one hundred and twenty-five years. I would speak with less confidence if one authority entitled to any weight in this court holding otherwise could be found.

The meaning of the words, "require the examination of a long account, either on the one side or the other," and of their analogues in the more recent statutes, has been frequently under consideration in the courts, and the words have not always been literally construed. They have required construction and their literal meaning has frequently been limited, as is shown by decisions of this court above cited, and by many other decisions.

To say that a cause of action is referable in its nature when it has not of itself a single referable quality, and which cannot, on account of anything pertaining to it, be referred, is a most inaccurate use of language, and it is to me inconceivable that Judges RAPALLO, CHURCH and MAYNARD, in the opinions above cited, used the expression as meaning a cause of action which could only be made referable by something appearing in the answer.

This discussion, therefore, comes to this: If the plaintiff brings his action upon a long account, then it is such as was referable prior to 1777, and as the examination of a long account is required on his side the defendant cannot defeat a reference by anything he may set up in his answer by virtue of the statutes allowing set-offs and counterclaims. If the plaintiff's cause of action be upon contract for a definite sum of money, or for damages, *ex contractu*, and his cause of action

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be not gainsaid by the defendant, and the defendant sets up a counterclaim which requires the examination of a long account, then the case is such as would have been referable under the act of 1768. But if in such actions the plaintiff's cause of action be disputed, then a case is presented, which, prior to 1777, gave the parties the absolute right to jury trial, and that right cannot be taken away or destroyed by anything which the defendant may set up in his answer.

These views furnish a plain rule for the guidance of courts, resting upon a solid basis, and I think it would be most unwise to countenance any other practice. According to the contention now made on behalf of the plaintiff, for the purpose of distinguishing this case from that of *Untermeyer v. Beinhauer*, if the plaintiff brings an action to recover \$1,000, payable to him by virtue of a contract, the defendant may dispute his claim, and set up a counterclaim which requires the examination of a long account, and then the action becomes referable. But if he sues upon a contract, possibly the same contract, seeking to recover \$1,000, unliquidated damages for a breach thereof, and his claim is disputed by the defendant, who also sets up a counterclaim requiring the examination of a long account, the action is not referable. Such a distinction is not founded in reason, and no rule of convenience or of public policy requires that it should be adopted. The following authorities may also be referred to as sustaining the conclusion I have reached: 20 Am. and Eng. En. 670; *Williams v. Allen* (2 Hun, 377); *Wood v. Hope* (2 Abb. N. C. 186); *Verplanck v. Kendall* (45 Sup. Ct. R. 525); *Gregory v. Seaman* (51 id. 517). This conclusion preserves to the parties the constitutional right to trial by jury of the issues upon a non-referable cause of action alleged in the complaint, and a right to the reference of the long accounts set up in the answer, and thus all the statutes have full force and effect, and the decisions of the courts are harmonized and rendered consistent.

The orders of the General and Special Terms should, therefore be reversed, and motion for reference denied, with costs in all the courts.

ANDREWS, Ch. J. (dissenting). This appeal involves the question of the power of the court under the State Constitution and laws to order a compulsory reference of the action. The action is on contract and is referable in its nature. But having regard alone to the cause of action set forth in the complaint, it was not the subject of a compulsory reference for the reason that no long account was involved. The action was to recover four months salary alleged to be due and unpaid to the plaintiff under a contract of employment at an annual salary of six thousand dollars. The defendant answered denying the complaint, and in addition pleaded several defenses by way of counterclaim arising on matters of account, and the answer concluded by prayer for judgment that the plaintiff account for the moneys mentioned in the second and third counterclaims, and that the defendant recover the sum which might be found due from the plaintiff to the defendant on such accounting. The plaintiff replied denying the counterclaims, and then, upon the pleadings and proceedings and upon affidavit, moved for an order of reference, on the ground, in substance, that, upon the facts disclosed, it appeared that the trial of the issue on the third counterclaim in the answer would involve the examination of a long account. The motion was opposed by the defendant, but was granted, and an order of reference was made, from which the defendant appealed to the General Term of the first department, which affirmed the order, and from the order of affirmance this appeal is taken. It was competent for the judge who granted the order to find, upon the facts presented, that the trial of the issue on the third counterclaim would involve the examination of a long account, and that on the trial none of the issues would require the decision of any difficult questions of law, and this finding, having been affirmed by the General Term, is not reviewable here.

The appeal, therefore, presents the question whether a compulsory reference may be directed in an action on contract to recover stipulated payments, upon it being made to appear that, although no long account will be involved in maintain-

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ing the plaintiff's cause of action, nevertheless such account will be involved and will be litigated on the issue raised by the counterclaim in the answer. The question presented in another form is whether a cause of action, referable in its nature, but which cannot be referred of itself alone, because not involving the examination of a long account, may be referred against the protest of either party, if a counterclaim, also arising upon contract, is interposed, which will involve the examination of a long account.

If the power to order a compulsory reference in this case depends alone on section 1013 of the Code of Civil Procedure, there can be no doubt that the court had jurisdiction to make the order. The language of the section is explicit and unambiguous. It authorizes a compulsory reference where the trial of an action will involve an examination of a long account "on either side," and there are no difficult questions of law. It needs no gloss or argument to show that the case in hand is within the express language of the section. There is a long account on the side of the defendant, arising on its counterclaim, and the legal questions involved are of the simplest character. The words "on either side" in section 1013 are not new as applied to compulsory references. Compulsory references were first authorized by the colonial statute of 1768. (Van Schaick's Laws, vol. 2, p. 517.) The act is entitled "An act for the better determination of personal actions depending on accounts." The first section authorizes a compulsory reference whenever it shall appear probable "in any case depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account either on the one side or the other." The law authorizing compulsory references has been re-enacted in the successive revisions of the laws since the organization of the state government, and in all of them the language of the colonial statute of 1768, that a reference may be ordered when it shall appear that the trial of an action will involve the examination of a long

account "either on the one side or the other," has been in substance retained and continued, so that at no time since 1768 have these words not been incorporated in the law relating to compulsory references. (Laws of 1788, ch. 46; Laws of 1801, ch. 90; Laws of 1808, ch. 1; 1 Rev. Laws 1813, ch. 56; 1 Rev. St. 384, sec. 39.)

But the claim is made that, notwithstanding the broad and unqualified language of the statute, the constitutional right of trial by jury stands in the way of a compulsory reference of actions on contract, where the plaintiff's debt or demand is put in issue by the answer, and the necessity for the examination of a long account only arises upon a set-off or counter-claim interposed by the defendant. It is insisted that the words "on either side" in the statutes regulating compulsory reference are, by the operation of the Constitution, to be construed with this implied limitation. The Constitution of 1777 ordained that "trial by jury in all cases in which it hath heretofore been used in the colony of New York shall be established and remain inviolate forever," and the same provision in substance is to be found in each of the subsequent State Constitutions. Under the Dutch rule all actions were triable by the court, and trial by jury was unknown. The question whether actions were referable never arose. There was no need of references except for the information of the court. The argument is that the right of a defendant during the colonial period to interpose a set-off, depended upon and was limited by the Statute of Set-off enacted by the colony of New York in 1714 (Van Schaick's Laws, p. 95), and which continued in force until the Revolution, and that that statute confined the right of set-off to cases where the defendant admitted on the record the plaintiff's claim, and did not authorize a defendant to put the plaintiff's claim in issue and at the same time to interpose a set-off. It is insisted, therefore, that the words "either on the one side or on the other" in the act of 1768, authorizing compulsory references, must be construed as referring only to cases where a long account was connected with the plaintiff's claim or arose on the defend-

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ant's set-off interposed in connection with an admission of the demand of the plaintiff. The conclusion is, therefore, deduced that the power of compulsory reference at the time of the adoption of the Constitution of 1777, not having been extended to cases of set-off, connected with a denial of the plaintiff's claim, the right of trial by jury in such a case then existed and was forever preserved by the Constitution. This argument and conclusion, even if founded upon correct premises, is very technical and unsatisfactory in its results, but it also proceeds, as I think, upon a misapprehension of the true meaning of the constitutional provision. But the argument puts upon the statute of 1714 a construction contrary to the practical construction uniformly applied by the courts to statutes of like character. The clause in the statute of 1714 (Van Schaick's Laws, p. 93), authorizing set-offs, that "if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the debt or sum demanded, giving notice in writing with the said plea upon what he will insist upon at the trial for his discharge, and give any bond, bill, receipt, account or bargain so given notice of in evidence," is claimed to limit the right of set-off under the statute to cases where the defendant admits and does not put in issue the plaintiff's demand. But the words "cannot gainsay the deed, bargain or assumption upon which he is sued," and the subsequent words, were inserted simply to declare a rule of pleading and to enable a defendant who had no defense to the plaintiff's claim, to prove, under a plea of payment, a set-off, of which notice had been given, and these words were not intended to confine the right of set-off to cases where the defendant affirmatively admits the plaintiff's demand. There are no negative words. Proof of disconnected demands would not support the plea of payment except by statute. If there might originally have been a question as to the construction of the statute in this respect, the construction put by the courts upon similar words have removed any doubt. The Statute of Set-off of 1714 and

the act of 1768, authorizing compulsory references, were, in substance, re-enacted and incorporated into the "Act for the amendment of the law and the better advancement of justice," of February 27, 1788, chapter 46 (2 Greenleaf's Laws, 102); also in the act of the same title, chapter 90 of the Laws of 1801 (1 Webster's Laws, p. 347); also in the Laws of 1813 (1 Rev. Laws, ch. 56, p. 513). In each of these statutes the section relating to set-offs contains the same words found in the statute of 1714, "if the defendant or defendants cannot gainsay the deed, bargain or assumption upon which he, she or they is or are sued, it shall be lawful," etc. Numerous cases are found in the reports of this state, commencing from an early period after the formation of the state government, arising under these statutes, where, in connection with the general issue, the defendant gave notice of set-off. The set-off was in some cases allowed and in some cases disallowed, but in none of them was it suggested by court or counsel that the defendant, in order to avail himself of the right of set-off, must admit the plaintiff's demand. On the contrary, not only was the plaintiff's claim put in issue in all these cases, but in some of them it was litigated on the trial. (*Gordon v. Bowne*, 2 Jo. 150; *Burgess v. Tucker*, 5 id. 105; *O'Callaghan v. Sawyer*, Id. 118; *Tuttle v. Bebee*, 8 id. 152; *Root v. Taylor*, 20 id. 137; *Bridge v. Johnson*, 5 Wend. 342.) These cases refute the claim that, prior to the Revised Statutes, a defendant could not contest by his pleading, and upon the trial, the plaintiff's claim, and at the same time insist upon a set-off in case he failed to establish his defense to the plaintiff's cause of action. It cannot be supposed that the judges and lawyers of that time were unacquainted with the practice of the colonial courts, or that they overlooked so easy an answer to the defense of set-off as that furnished by the words "if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued," if they have the construction now claimed for them. It is noticeable that in the case of *Root v. Taylor*, Ch. J. SPENCER quotes the statute of 1813, and included in the quotation are the words, "if the defendant cannot gainsay," etc.,

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and in that case, which was assumpsit for goods sold and delivered, the defendant had pleaded the general issue with notice of set-off. The rule that a defendant may at the same time deny the plaintiff's claim and give notice of set-off, and thereby put the defendant to proof of his demand, prevailed in England under the English Statutes of Set-off. (2 Geo. II, ch. 22, sec. 13, and 8 Geo. II, ch. 24, sec. 4.) *Harington v. Macmorris* (5 Taunt. 228) was an action for money had and received, money lent, etc. The defendant pleaded the general issue with notice of set-off, the particulars of which were furnished. The jury found against the set-off. The plaintiff relied for the proof of his claim on the admission of the notice of set-off, and had a verdict. The verdict was set aside on the ground that the admission in the notice of set-off was not available to the plaintiff to establish his demand. Lord MANSFIELD said: "It is every day's practice that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and justification pleaded, when the justification would certainly, if admissible, prove the act in case the reason of justification fails. Therefore, the particulars of the set-off must be incorporated with the notice of set-off and cannot be given in evidence to prove the plaintiff's demand on the issue of non-assumpsit." The quotation from BLACKSTONE (vol. 3, p. 304) is quite consistent with the opinion of Lord MANSFIELD. The commentator is there speaking of the rule relating to tender and the payment of money into court to mitigate damages and costs, and he says in substance, that, under a plea of set-off (which, standing alone, necessarily admits the plaintiff's claim), it is necessary, if the set-off does not equal the plaintiff's debt, that the defendant should pay the balance into court to have the benefit of tender in mitigation of further costs, etc. The rule that the general issue with notice of special matter, puts in issue the plaintiff's cause of action; is elementary. (1 Chit. Pleadings, 478; *Vaughan v. Havens*, 8 Jo. 109.) It has been frequently applied by other courts in this country in case of set-off. (*Price v. Combs*, 12

N. J. L. 189; *Morgan v. Boone*, 1 J. J. Marsh. 585.) There are no records showing the practical construction placed by the colonial courts upon the statute of 1714 upon the point now in question, but the English Statutes of Set-off were enacted nearly fifty years before the organization of our state government under which the practice prevailed of permitting a defendant to deny the plaintiff's claim in connection with notice or plea of set-off. It is presumable that the same practice was followed in the colony, and the practice of the state courts, following the English practice under statutes similar to that of 1714, makes this presumption almost a certainty. The English decisions, says Chief Justice KENT in *Gordon v. Bowne*, on the construction of the English Statute of Set-off, "are perfectly in point as to the construction of our act," and Statutes of Set-off, from the time of their enactment, have been "liberally expounded to advance justice and prevent circuity of action." (THOMPSON, J., in *Tuttle v. Bebee*, 8 Jo. 152.) The argument against the power to order a compulsory reference in this case based upon the assumption that when the Constitution of 1777 was adopted, no long account could be litigated arising on a set-off, except where the defendant admitted the plaintiff's claim, and that the act of 1768 authorizing compulsory references did not apply in a case like the present one, where the plaintiff's claim is denied, proceeds upon false premises and cannot be maintained.

But there is, I think, another conclusive answer to the objection based on the Constitution. The words in the Constitution of 1777, "trial by jury in all cases in which it hath heretofore been used in the colony of New York," shall be established and remain inviolable forever," were intended to preserve the right of jury trial in the classes of cases where trial by jury before as of right existed. In expounding this provision the principle which governed the colonial practice permitting compulsory references, is to be applied. Cases of the same class and governed by the same principle of public policy as those within the act of 1768, may be referred consistently with the constitutional provision, although the exact

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case in hand was not within the terms of that statute. The policy upon which the statute of 1768 was enacted is recited in the preamble, which, after referring to the disuse of the action of account and to the law of 1714 permitting discounts in support of the plea of payment, proceeds to declare: "So that by the change in the law and practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions and jurors perplexed and rendered more liable to attainments, and by the vast time necessarily consumed on such trials, other causes are delayed and the general course of justice greatly obstructed; it is enacted, therefore," etc. It cannot be supposed that the Constitution of 1777 intended to prevent a reference of cases of the same general class as those specified in the act of 1768, and as to which the same considerations of public policy applied, even although, by reason of the rules of pleading and procedure prevailing in the colony, a set-off in a particular case involving the examination of a long account was not permitted. The principle established by the colonial legislation was that action on contract involving litigations of long accounts "on either side" should be referred for trial to referees, to relieve jurors from perplexity and to prevent the obstruction of justice. This legislative power was not abrogated by the Constitution. It would be a narrow and injurious construction of the constitutional provision that unless you are able to point out the precise case under colonial laws, a compulsory reference cannot be had. The act of 1768 excepted from its operation suits "brought by or against executors or administrators." This exception was expressly abrogated in the act of 1788 and the subsequent statutes of the state. But this abrogation of the exception was inoperative and in violation of the Constitution, if you say that no compulsory reference can be authorized in any case not referable under the colonial laws, although the case is within the principle and policy upon which these laws were based. If the Constitution restricts, as is claimed, the power of compulsory reference to the exact cases specified in the colonial act of 1768, then I perceive no escape from the conclusion that whenever now an

executor or administrator is a party to an action, it cannot be compulsorily referred, although the action may be on contract and involves a long account on either or both sides. The present case is an action on contract for debt. The set-off was also a matter of account. It was properly pleaded. The statute of set-off permits the defendant to contest the plaintiff's claim, and, at the same time, to insist upon a set-off. The trial of the set-off involves the examination of a long account. The statute permits a compulsory reference in such case, and no constitutional right, I am persuaded, stands in the way of its enforcement.

But it is said that the question involved in this case has been decided adversely to the power exercised, in three cases in this court, viz.: *Townsend v. Hendricks* (40 How. Pr. 143), *Welsh v. Darragh* (52 N. Y. 590) and *Untermeyer v. Beinhauer* (105 id. 521). This is a plain misapprehension. It is said in those cases that the referable character of an action is to be determined by the complaint. This was an accurate expression, having reference to the cases in which it was used and the sense intended. Bearing in mind two well-settled principles established by the decisions, first, that actions *ex delicto* were not the subject of compulsory reference, either in the colony of New York or afterwards (*Johnson v. Parmely*, 17 Jo. 129; *Green v. Patchen*, 13 Wend. 293; *Dederick's Admrs. v. Richley*, 19 id. 108); second, that set-offs are not allowed in actions for unliquidated damages, although arising on contract, "as for not delivering goods according to contract" (1 Chitty Pleadings, 572; *Duncan v. Lyon*, 3 Jo. Ch. 351; *Hepburn v. Hoag*, 6 Cow. 614), the principle upon which the decisions in this court proceeded in the cases referred to, is readily ascertained. *Townsend v. Hendricks* was an action for damages for false representations. The court, after referring to the pleadings, said: "The action must, therefore, be held to be one founded in tort, and not referable against the will of either party." *Welsh v. Darragh* was an action on a contract for the sale and delivery of merchandise sold by the plaintiff to the defendant. The defend-

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ant, among other things, set up in his answer fraud and deceit in the sale of certain other merchandise not included in the complaint. A reference having been ordered on the application of the plaintiff, the defendant appealed from the order. He resisted the reference on the ground that the issue of fraud raised by the answer was not referable, seeking to apply to the case the rule that actions of tort are not the subject of compulsory reference. This court affirmed the order of reference, and in its opinion first stated that the action being on contract the case was referable in its nature. The court then considered the claim of the defendant, that the issue of fraud raised by the answer prevented the order of reference, and, deciding against this construction, said: "If the action is a referable one, the answer cannot make it non-referable." Having disposed of these questions, it proceeded to consider whether, upon the facts, a long account was involved in the plaintiff's cause of action, and, reaching a conclusion that there was, affirmed the order. There is no hint in the opinion of the doctrine now contended for, that in an action upon contract a compulsory reference may not be ordered, where the examination of a long account will become necessary on the trial of a counterclaim arising on contract, unless the plaintiff's cause of action involves the examination of a long account, or the plaintiff's claim is admitted. *Untermeyer v. Beinhauer* was an action to recover unliquidated damages for the breach by a builder of a building contract, and the court held that such an action was never referable against the will of either party, saying: "It was simply an action for unliquidated damages for the breach of a contract and in no sense involved any account." Neither of these cases sustain or tend to sustain the contention here. The case of *Kain v. Delano*, decided by this court and reported in 11 Abbott's Practice (N. S.), 29, was an appeal from an order of reference made on the ground that the trial of an issue raised by a counterclaim would require the examination of a long account. The plaintiff's claim consisted of but a single item, and was denied by the answer, which also set up a counterclaim. This court

reversed the order of reference on the ground that the fact upon which the order proceeded did not appear. It assumed that the order would have been justified if it had appeared that the issue on the counterclaim would require the examination of a long account. The rule here contended for is plain, simple and practical. It is consistent with the Constitution. It is in harmony with the public policy upon which statutes for compulsory references are based. The opposite rule violates the language of all statutes on the subject framed since colonial times. It is based on views so close and critical that they can be comprehended only with difficulty. It puts it in the power of a plaintiff by exaggerating his own claim, to prevent its admission by the defendant, and thereby defeat a reference of a long account arising on a counterclaim. If the order in this case is reversed, the court will, I think, reverse the practice which has prevailed in the courts of this state without question for more than a hundred years. It is the strongest confirmation of the view that the words "on either side" mean what they plainly import, that no suggestion can be found in any of the reports, so far as I can discover, of the limitation now contended for. If a practice prevailed in opposition to the natural import of the words, a trace of it would have been found. There would have been some judge or lawyer who would have queried how this could be. The distinction is between actions of a referable quality and such as are not referable by their very nature. In the one class the court may compel a reference, if on "either side" there is a long account; in the other, no reference can be compelled, however many items of damage there may be.

I think the order should be affirmed.

All concur with EARL, J., for reversal, except ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting.

Orders reversed.

HENRY H. SNOW, Respondent, v. JOSEPH PULITZER,
Appellant.

Where one of several houses belonging to the same owner is so constructed as to require the support of the wall of the adjoining house, and the owner leases the former, the tenant is entitled to that support, and in case the owner or his grantee removes the wall, he is a trespasser and liable to the tenant for his damages.

Where a lessor of premises leased and occupied for business purposes has been evicted and his business broken up by the unlawful acts of his landlord, the prospective profits of his business for the remainder of the term is a proper item of damages.

The owner of two adjoining buildings in the city of New York leased the first floor of one of them to plaintiff for a term of years for a store. Said owner subsequently sold and conveyed both buildings to defendant, who commenced tearing down the building adjoining plaintiff's; when a portion was removed the wall of plaintiff's building began to crack and break. Proceedings were thereupon taken by the fire department of New York by which plaintiff's building was condemned as unsafe, and its removal was directed. Defendant thereupon tore it down and plaintiff was ousted. In an action to recover damages, it was found that at the time of the lease to plaintiff the building in which his store was located was dependent for support upon the adjoining wall. *Held*, that plaintiff was entitled to that support; that defendant could not lawfully remove the wall and so render the demised premises untenable, and in so doing he was a trespasser; that the fact that defendant when he began to take down the wall was ignorant that the adjoining building was dependent upon it for support did not affect his responsibility; nor was he protected from responsibility by the decision of the fire department, as it was his act that rendered the building unsafe and created the danger.

It was provided in plaintiff's lease that the store should be exclusively used for the sale of confectionery; he made some expenditures in fitting up the store. At the time he was evicted he was doing a large and profitable business and had on hand a large stock. The trial court charged the jury, in substance, that in assessing damages they could take into consideration the expenditures so made, the damage to and depreciation of the stock on hand, also the profits he could have made in his business if he had been permitted to carry it on to the end of his lease. *Held*, no error.

Reported below, 66 Hun, 329.

(Argued April 10, 1894; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages to property held by plaintiff, as lessee, and caused by the tearing down of an adjoining building.

The facts, so far as material, are stated in the opinion.

John M. Bowers for appellant. The common owner of two independent adjoining buildings, conveying or leasing one of them, does not, under ordinary circumstances, grant an easement in his adjoining property of any kind. (Laws of 1882, chap. 410, § 474; *Humphries v. Brogden*, 12 Ad. & El. 738; *Parker v. Foot*, 19 Wend. 309, 318; *Palmer v. Wetmore*, 2 Sandf. 316; *Meyers v. Gemmel*, 10 Barb. 537, 546; *Shipman v. Beers*, 2 Abb. [N. C.] 435, 438; *Royce v. Guggenheim*, 106 Mass. 201, 205; *Mullen v. Stricker*, 19 Ohio St. 135, 144; *Morrison v. Marquardt*, 24 Iowa, 35; *Keats v. Hugo*, 115 Mass. 204.) There was no eviction by the defendant and appellant. (2 Wood's Landl. & Ten. [2d ed.] 1101, 1104, 1107; *Cram v. Dresser*, 2 Sandf. 120, 126; *Edgerton v. Page*, 1 Hilt. 320, 330; 20 N. Y. 281; *H. L. Ins. Co. v. Sherman*, 46 id. 370; *Borell v. Lawton*, 90 id. 293, 297; *Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw. 127; *Doupe v. Genin*, 45 N. Y. 119; *Smith v. Kerr*, 108 id. 31, 34; *Miller v. N. Y., L. & W. R. R. Co.*, 125 id. 118, 122.) The rule of damages, where there is a breach of the covenant for quiet enjoyment contained in a lease, is simple. If the breach be without the fault of the landlord, the damages are the rents paid in advance. If the breach be the fault of the landlord, the damages are the value of the unexpired term, less the rents reserved. (*Kinney v. Watts*, 14 Wend. 38; *Kelly v. Dutch Church*, 2 Hill, 105, 115; *Noyes v. Anderson*, 1 Duer, 342; *Dennison v. Ford*, 10 Daly, 412; *Giles v. O'Toole*, 4 Barb. 261; *Mack v. Patchin*,

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42 N. Y. 167; *In re Strasburger*, 132 id. 132; *Carter v. Burr*, 39 Barb. 59, 64.) Only the damages which might be expected to follow from the act complained of can be recovered. Except in cases of breach of contract, the act must be wrongful. (*Schile v. Brokhahus*, 80 N. Y. 614, 620; *O'Neill v. N. Y., O. & W. R. R. Co.*, 115 id. 579.) The defendant is not liable for the loss or destruction of any articles belonging to the plaintiff. (*Edson v. Weston*, 7 Cow. 278; *Beardslee v. Richardson*, 11 Wend. 25.) The defendant is not liable for the loss or destruction of any articles which the plaintiff claims to have put into his shop when he fitted it up. (*Walton v. Meeks*, 120 N. Y. 79; *Peters v. McKeon*, 4 Den. 546; *Pitcher v. Livingston*, 4 Johns. 1; *Kinney v. Watts*, 14 Wend. 38, 41.)

Abel Crook for respondent. The lease by Mrs. French to plaintiff creating a term for years contained, both expressly and by implication, a covenant of peaceful and quiet enjoyment, which was binding upon the defendant, who accepted his conveyance subject to such lease. This included a right of support of the premises necessary to beneficial enjoyment by plaintiff. (*Moore v. Weber*, 71 Penn. St. 429; *Graves v. Berdan*, 26 N. Y. 498; *Mack v. Patchin*, 42 id. 167.) This covenant, whether express or implied, was broken up on the unlawful interference by defendant, under color or claim of right, with the enjoyment by the plaintiff of the premises. (*Tone v. Brace*, 11 Paige, 566; *Mayor, etc., v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 id. 327; *Burr v. Stenton*, 43 id. 462.) Neither physical force nor legal process is necessary to constitute an eviction. Any interference on the part of the landlord which impairs the beneficial enjoyment of the demised premises is sufficient disturbance of the possession to constitute an eviction. (*H. L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Cohen v. Dupont*, 1 Sandf. 260; *Sherman v. Williams*, 113 Mass. 481; *Bentley v. Sill*, 35 Ill. 414; *Rogers v. Ostrom*, 35 Barb. 523.) The rule that no servitude of support of one building by another arises from their mere

juxtaposition, where the two buildings are owned by different persons, has no application. (*Partridge v. Gilbert*, 15 N. Y. 610.) Defendant's removal of the wall in disregard of plaintiff's easement of support therein and his destruction of the building occupied by plaintiff was not only an eviction and actual disturbance of the possession, and entry and expulsion of the plaintiff, but constitutes such a trespass as renders him liable for all resulting damages. Defendant's intent was established by facts justifying the jury to infer it. (*Edgerton v. Page*, 14 How. Pr. 116; 20 N. Y. 281; *Schile v. Brokhahus*, 80 id. 614; *Boreel v. Lawton*, 90 id. 293, 296; *Vann v. Rouse*, 94 id. 401; Wood's Landl. & Ten. [2d ed.] 1101; 2 Whart. on Ev. § 1258; 3 Greenl. on Ev. [6th ed.] 18, § 14; *York's Case*, 9 Metc. 103; *Van Pelt v. McGraw*, 4 N. Y. 110; *Filkins v. People*, 69 id. 101, 106, 107; *People v. Orcutt*, 1 Park. Cr. 252.) The rule that a person who has entered into a contract for a specific work to be done by another is not liable for the act or conduct of the contractor has no application to this case, because the thing contracted to be done, so far as it affected the plaintiff's easement of support in the wall, was unlawful. (*Kings v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181-185.) The ordinary rule of damages in cases of eviction of a tenant by a landlord is the value of the unexpired term of the lease at the time of the eviction over and above the rent reserved by the terms of the lease. This rule has exceptions, and is relaxed or modified to meet the injustice done by it to lessees in particular cases. (*Mack v. Patchin*, 42 N. Y. 167, 172, 175; *Trull v. Granger*, 8 N. Y. 115; *Myers v. Burns*, 35 id. 272; *Novlan v. Trevor*, 2 Sweeny, 67; *Driggs v. Dwight*, 17 Wend. 71; *Chatterton v. Fox*, 5 Duer, 64; *Hexter v. Know*, 63 N. Y. 561.) The right to recover damages is commensurate with the wrong done, and, where the defendant becomes an actor and commits an actual trespass, he is liable for all damages naturally resulting. (*Schile v. Brokhahus*, 80 N. Y. 614; *Pollett v. Long*, 56 id. 200.) The verdict of \$5,200 was not excessive. (*Marquart v. La Farge*, 5 Duer, 559; *White v. Miller*, 71 N. Y. 118;

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78 id. 39; *Schile v. Brokhahus*, 80 id. 614; *Wakeman v. W. & W. M. Co.*, 101 id. 205, 215.) The judgment and order denying new trial should be affirmed, and ten per cent penalty should be added. (Code Civ. Pro. § 3251, subd. 5; *Schile v. Brokhahus*, 80 N. Y. 614.)

EARL, J. In 1848 Mr. French erected a seven-story building in the city of New York. Subsequently another person erected an adjoining four-story building, and still later another owner erected another adjoining building, thus making three buildings in the block. There were no party walls, the buildings all having independent walls. Subsequently French became the owner of all the buildings and converted them into a hotel, called French's Hotel, the buildings being used together as one building with doors and openings through them.

The hotel property passed by will from French to his daughter, Helen A. French, and in January, 1886, she leased the first floor of the four-story building to the plaintiff for a term ending on the first day of May, 1889. While the plaintiff was in the occupancy of his store, on the 10th day of April, 1888, she conveyed the entire block, designating it as French's Hotel, and describing it as an entirety, subject to the lease, to the defendant. In June thereafter he commenced to tear down the seven-story building, and after the four upper stories thereof had been removed down to the third story of the four-story building, it was found that the wall of the four-story building was supported by the adjoining wall of the seven-story building, and that it could not stand without such support; and it began to crack and break and there was imminent danger of its falling. Upon making this discovery the persons engaged in taking down the seven-story building under the defendant discontinued their work; and thereafter proceedings were taken by the fire department of the city of New York by which the four-story building was condemned as unsafe, and there was a judgment directing the superintendent of buildings to remove the same; and in obedience to

that judgment the defendant tore down the four-story building, and the plaintiff was thus deprived of the benefit of his lease, was ousted from the possession of the store and his business broken up; and he brought this action to recover his damages.

The contention of the defendant is that the plaintiff was not entitled to have the wall of the building in which his store was situated supported by the adjoining wall of the seven-story building, that there was no easement in that wall for the support of the wall of the four-story building, and hence that no legal wrong was done to the plaintiff by the tearing down of that wall.

The trial judge held that if at the time of the lease to the plaintiff the wall of the building in which his store was located was dependent for support upon the adjoining wall, he was entitled to such support, and the defendant could not lawfully remove that wall, and thus render the four-story building untenable. In this ruling we think the trial judge was clearly right. We are not dealing with a case where at the time of the demise the two buildings were separately owned, but with a case where they were owned by the same person, and where all the buildings were held and owned as one entire property. When the plaintiff leased his store he became entitled, as against the lessor, to the store as it then was, and as against him to have the walls sufficiently supported as they then were; and if the wall of the four-story building could not stand of itself, then he was entitled to the support of the wall of the seven-story building, and the two walls constituted the wall of his building; and the defendant had no right to remove any portion of the wall of the four-story building, or any of its supports, so as to drive the plaintiff from his store. A landlord in such a case would have no more right to take down the supporting wall than he would to tear down the demised building itself.

The contention of the landlord here is against both reason and justice, and has no support in any precedent or any principle of law. The rights of the plaintiff do not depend upon

the technical doctrine of eviction. The defendant was a trespasser and a wrongdoer, and is just as responsible for the consequences of his acts as he would have been if he had removed the roof from the building or entered the plaintiff's store and physically expelled him. The responsibility of the defendant in no way depends upon his knowledge that the wall of the seven-story building was necessary to the support of the wall of the four-story building. He was bound to know what he was about and cannot shield himself against a trespass because he did not foresee the consequences of his acts, or even because he did not know that he was trespassing. If he supposed that he was entitled to take down the wall of the seven-story building, to the support of which plaintiff was entitled for his store, he was mistaken, and is responsible for the consequences of his mistake. When he learned that the wall of the four-story building could not stand without the support of the wall of the seven-story building, he was bound to take the consequences of his acts or to rebuild that wall and thus support the wall of the four-story building.

The defendant is not protected from responsibility in this case, because, after he had removed the wall of the seven-story building down to the third story of the four-story building, thus rendering the latter dangerous and insecure, the fire department caused it to be removed. It was his act that brought on the proceeding by the fire department. He created the danger which invoked its action. It was due to his act solely that the building was finally taken down, and the plaintiff ousted and deprived of his lease. While no authority is needed for a conclusion depending on such obvious principles of right and justice, the case of *Richards v. Rose* (9 Exchequer R. 218) may be cited as having some bearing. There it was held, that where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighboring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, the legal presumption being that the owner reserves to himself such right, and at the same time grants to

the new owner an equal right; and consequently if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles.

The learned counsel for the defendant complains that an improper rule or measure of damages was adopted by the trial judge. It was provided in the lease of the store to the plaintiff that the store should be used exclusively for the sale of confectionery; and at the time the plaintiff was evicted and his business broken up he was doing a large and profitable business in his line, and had on hand a large quantity of confectionery which he was required to remove. The trial judge held that if the plaintiff was entitled to recover at all he was entitled to recover the damages which were the natural consequences of the destruction of the building occupied by him and his eviction therefrom. He had made some expenditures in fitting up the store for his business, and the judge charged the jury that they could take those expenditures into consideration. There was also damage to, and depreciation of, the stock of confectionery he had on hand, and the judge charged the jury that they could take that into consideration. He also charged the jury that, in estimating the plaintiff's damages, they could consider the profits he could have made in his business if he had been permitted to carry it on to the end of his lease. The charge of the judge as to these various items of damages seems to have been carefully limited and explained, and the only exception to which our attention is called bearing on the damages is the final exception in the case to the charge "in respect to the measure of damages." The judge was not requested to limit or explain his charge as to the measure of damages or in any way to modify the rules laid down by him, and his attention was not called to any particular part of his charge on the question of damages of which complaint was made; and hence the general exception is not available here. But the principal item of recovery was on account of the prospective profits in the plaintiff's business

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during the remainder of the term of his lease, and that they were proper to be considered in estimating his damages in a case like this, where he was evicted and his business broken up by the trespass and wrong of the defendant, was decided in *Schile v. Brokhahus* (80 N. Y. 614).

The judgment should, therefore, be affirmed, with costs.

All concur, except GRAY, J., not voting.

Judgment affirmed.

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s 151	191
142	271
154	683

THE PEOPLE ex rel. ROSWELL W. KEENE, Appellant, v. THE BOARD OF SUPERVISORS OF QUEENS COUNTY, Impleaded, etc., Respondent.

The act of 1891 (Chap. 290, Laws of 1891), which authorizes and empowers the boards of supervisors of the counties of Kings and Queens to build a bridge, at a point specified, over navigable waters dividing the two counties, "or to show cause," etc., is in contravention of the provision of the State Constitution (Art. 18, § 8) prohibiting the state legislature from passing local bills providing for building bridges.

The duty imposed by the "County Law" of 1892 (§ 68, chap. 18, Laws of 1892) upon the boards of supervisors of two counties divided by navigable tide waters spanned by a bridge on a highway crossing such waters, to keep the same in repair, is mandatory, not discretionary, and when the reparation requires that the bridge shall be re-built, it is the duty of the two boards to re-build it.

The performance of this duty may be compelled by mandamus.

A citizen of one of the counties who is put to inconvenience by reason of the non-repair of the bridge, and so is injured by the inaction of the boards, is entitled to be a relator in proceedings by mandamus to compel the performance of their duty.

It is the office of a writ of mandamus in such a case to put the boards in motion simply; it is for them to determine the character of the bridge, so only that it meets the public needs. The courts may not control their discretion in this respect, so long as they act in good faith.

An alternative writ of mandamus is equivalent to a complaint in an action, and a demurrer thereto stands as a demurrer in an ordinary suit.

Where, therefore, the substantial right is set out in an alternative writ, the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled.

The court, *it seems*, may, in awarding the peremptory writ, mould it according to the just rights of all the parties.

The provision of the act of Congress of 1890 (§ 7, chap. 907), prohibiting the construction of such a bridge until its location and plan shall be approved by the secretary of war, does not justify inaction on the part of the boards of supervisors, and, *it seems*, the matter may be provided for in the peremptory writ.

People ex rel. Keene v. Supervisors (71 Hun, 97), reversed.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made August 25, 1893, which affirmed an order of Special Term sustaining a demurrer by defendant to an alternative writ of mandamus.

The relator applied, under the act of 1891, an act amending chapter 487 of the Laws of 1884, entitled "An act authorizing the construction of a drawbridge over Newtown creek in Queens county," as amended by chapter 184 of the Laws of 1887 (Chap. 290, Laws of 1891), for a mandamus requiring the boards of supervisors of the counties of Kings and Queens to construct and maintain a bridge across Newtown creek on Maspeth avenue.

The facts, so far as material, are stated in the opinion.

Roswell W. Keene, in person, for appellant. The writ and papers presented by the relator show that Maspeth avenue is a public highway. (Laws of 1872, chap. 780; Laws of 1838, chap. 262.) The demurrer admits all the facts stated in the writ and affidavits. (*Meyr v. S. I. R. Co.*, 7 N. Y. S. R. 245; *Cutter v. Wright*, 22 N. Y. 472; *Hall v. Bartlett*, 9 Barb. 297.) In a matter of public right, any citizen of the state may be a relator in an application for a mandamus (where that is the appropriate remedy) to enforce the execution of the common law or of an act of the legislature. (*People ex rel. v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 344; *People ex rel. v. Supervisors*, 56 id. 249; *People ex rel. v. Common Council*, 77 id. 511; 133 id. 214; *Hamilton v. State*, 3 Ind. 452; 5 id. 310; 123 Mass. 460; 78 Ill. 382.) The boards of supervisors of the two counties are in duty bound to

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provide for the care, maintenance, preservation and reparation of any draw or other bridge intersecting the boundary line of the counties over navigable tide waters, where such bridge is or is a part of a public highway, and in case of refusal of one or both boards to act, they can be compelled by the writ of mandamus to perform that duty. (Laws of 1880, chap. 320; *People v. Supervisors*, 1 Hill, 50; *People ex rel. v. Supervisors*, 8 N. Y. 317; *Boyce v. Supervisors*, 20 Barb. 294; *People ex rel. v. Board of Supervisors*, 32 N. Y. 473; *Gray v. State*, 72 Ind. 567; 72 Penn. St. 24; 32 Smith [Pa.], 132.) The point insisted on by the court below, and the learned counsel for the respondent, that the approval of plans must first be obtained from the secretary of war of the United States, is without force. (*Comm. v. New Bedford*, 2 Gray, 339; *Flanagan v. Philadelphia*, 42 Penn. St. 219.) The requisite duty is imposed upon the supervisors under the general laws or statutes of the state. (Laws of 1876, chap. 275, § 5; Laws 1879, chap. 364; Laws 1880, chap. 320; *People ex rel. v. Supervisors*, 51 N. Y. 402.) The direction of the writ to the board of supervisors is the proper remedy. (*Hill v. Board of Supervisors*, 12 N. Y. 52; *People ex rel. v. Supervisors*, 51 id. 402; *People ex rel. v. Supervisors*, 20 id. 252; *People ex rel. v. Supervisors*, 73 id. 173; Code Civ. Pro. § 2090.) The petition or affidavit and papers state all the facts necessary to justify the granting of the relief prayed for. (51 N. Y. 402; 112 id. 585; *Com. v. New Bedford Bridge*, 2 Gray, 339; 78 Penn. St. 457; 70 N. Y. 430; 1 Hill, 50; 17 Hun, 83; 45 id. 323.)

Francis H. Van Vechten for respondent. The bridge in question cannot legally be constructed until the location and plans of such bridge have been submitted to and approved by the secretary of war, nor can any steps in such direction be taken until such approval by the secretary of war of the United States of America, the stream in question being navigable waters. (§ 7 of the act of congress of the United States, adopted September 19, 1890.) This act of congress is

paramount, and no bridge can be legally built until the consent of the secretary of war has been obtained thereto. (*People ex rel. v. Kelly*, 76 N. Y. 475-482.) The mandamus is sought to compel the building of a bridge in violation of the United States laws, and mandamus will not lie to compel the violation of law. (*People v. Fowler*, 55 N. Y. 252-254; *Howland v. Eldridge*, 43 id. 457.) The relator has failed to show that he is legally and equitably entitled to have the bridge built. To entitle a relator to the writ he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ must be directed. (*People ex rel. v. Hayt*, 66 N. Y. 607.) The common-law responsibility of counties for the repair of bridges never prevailed in this state. (*Hill v. Supervisors*, 12 N. Y. 52-57.) Were boards of supervisors charged as are highway commissioners, with the duty of building roads and bridges, the writ — assuming the special act (Chap. 290, Laws of 1891) to be valid — might lie, but boards of supervisors are not charged with such duties. Their powers in respect to roads and bridges are purely legislative, and not ministerial, and they alone can legally determine when, where and under what circumstances they will exercise such legislative powers. While a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which an officer may exercise judgment or discretion. (*People ex rel. v. Fairchild*, 67 N. Y. 334; *People ex rel. v. Leonard*, 74 id. 443-445; Laws of 1892, vol. 2, p. 2213, Highway Law, article "bridges.") That the power conferred on boards of supervisors to provide for the building of bridges, by chapter 482 of the Laws of 1875, is legislative and not ministerial is conclusively proven by the conditions existing at the time of its adoption. (Const. N. Y. art. 18, § 3; Id. art. 3, §§ 18, 23.) The special act authorizing the construction of the Maspeth avenue bridge is a local act and is unconstitutional. (*People v. P. R. Co.*, 86 N. Y. 1-7.) While a writ of mandamus may go to compel the

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exercise of their discretion by subordinate bodies and tribunals, it never requires a decision in any specified manner. (*People v. Common Council*, 78 N. Y. 39.)

ANDREWS, Ch. J. The demurrer to the alternative writ presents the question whether upon the facts alleged a duty rested upon the boards of supervisors of the counties of Kings and Queens to re-build the bridge over Newtown creek, on Maspeth avenue, where a bridge previously existed connecting the avenue in Queens county with the portion of the avenue in the county of Kings within the city of Brooklyn, and whether the remedy by mandamus in this proceeding should be awarded. The alternative writ, after reciting the facts stated in the petition, commands the boards of supervisors of the respective counties to construct a bridge over the creek at Maspeth avenue, specifying the width and other particulars conforming to the description in the act chap. 290 of the Laws of 1891, which authorized and empowered the boards of supervisors of the two counties to build a bridge at the point in question, "or to show cause," etc. The proceeding was commenced after the passage of that act, in reliance doubtless upon its validity. But it is now conceded that the act was in contravention of the constitutional provision (Art. 18, § 3) prohibiting the state legislature from passing local bills providing for building bridges, etc., and authorizing the enactment by the legislature of general laws conferring upon boards of supervisors powers of local legislation. If the only duty resting upon the boards of supervisors of the two counties in respect to the bridge in question was that attempted to be created by this statute, the proceeding must of necessity fail. But if there was an antecedent or subsequent duty imposed by other statutes now in force to re-build the bridge, and that duty is sufficiently set forth in the writ, the writ may go and that duty may be enforced, although the relator may have proceeded upon a mistake as to the validity of the act of 1891, unless upon technical objections to the form of the writ he must be remitted to a new proceeding.

Before considering the question of form we shall consider the primary question whether a duty is imposed by law upon the boards of supervisors of the two counties to re-build the bridge, independently of the act of 1891 ; that is, a duty disclosed upon the face of the writ, either absolute or conditional, which the defendants have failed to perform. It is averred in the writ that Maspeth avenue was opened as a highway in 1836 ; that it was the main thoroughfare of travel from the city of New York and Williamsburgh (now Brooklyn) to Queens county ; that in the year mentioned a drawbridge was constructed over Newtown creek at Maspeth avenue for public travel ; that the said avenue and bridge have continued as a turnpike, plankroad or as a public highway from 1836 ; that the turnpike and bridge company abandoned the road and bridge many years ago, and that for a period of five consecutive years (after such abandonment) the road and bridge was used as a public highway ; that the bridge a number of years ago became out of repair and was taken down or destroyed, and has not been re-built, etc. These and other facts alleged in the writ sufficiently show, on demurrer, that Maspeth avenue was a public highway, and that the bridge constituted a part of the same.

The duty to repair a bridge on a highway which has become out of repair is imposed by statute upon some local authorities. Under the general statutory system of this state the duty is placed on the towns or municipalities in which they are located, and not upon counties, as in England, although many exceptions have been created by special statute. (*Hill v. Supervisors of Livingston County*, 12 N. Y. 52.) It appears by the writ that Newtown creek is a navigable stream within the ebb and flow of the tide, and constitutes, at the point in question, the dividing line between Kings and Queens counties. The case, therefore, is brought within section 68 of the County Law of 1892 (Chap. 18). That section (which is substantially a re-enactment of sub. 5, sec. 1 of chap. 482 of the Laws of 1875, as amended by chap. 320 of the Laws of 1880), after declaring that "the board (of supervisors) shall provide for

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the care, maintenance and repair of any draw or other bridge," etc., and providing how the expenses shall be apportioned and paid, proceeds as follows: "But where such bridge shall span any portion of the navigable tide waters of the state, forming at the point of crossing the boundary line of two counties, such expense shall be a joint and equal charge on the two counties in which the bridge is situated, and the board of supervisors in each of such counties shall apportion such expense among the several towns and cities," etc. The duty imposed by this section upon the board of supervisors of two counties divided by navigable tide water, spanned by a bridge, on a highway crossing the stream, to keep the same in repair, is plainly administrative and mandatory, and not discretionary. It is power conferred in the public interest and for the public benefit, and is imperative within many authorities. (See *People v. Supervisors of Otsego County*, 51 N. Y. 401; *Com. v. New Bedford Bridge*, 2 Gray, 339.)

Upon the facts stated in the writ, which on demurrer are to be taken as true, we have the case of a bridge, part of a highway, over tide water which divides the counties, which has become out of repair, and the reparation of which requires that the bridge shall be re-built. The statute casts upon the two boards of supervisors the duty to make the reparation. This duty the two counties understood was imposed upon them, since they united in approving the bill which culminated in the law of 1890, but which is now conceded to be unconstitutional. The writ shows that the supervisors of Kings county have refused to pass any resolution authorizing the construction of a new bridge, and the supervisors of Queens refuse to proceed further than they have already gone. We think the demurrer was not well taken, unless some of the technical objections must prevail. The relator as a citizen of Queens county, owning property on Maspeth avenue, who is injured by the inaction of the supervisors, and who is put to inconvenience by reason of the non-repair of the bridge, is entitled to be a relator in this proceeding. (*In re Baird*, 138 N. Y. 95.) The command of the writ is undoubtedly too broad. It is for the boards of

supervisors to determine the character of the bridge to be built, so only that it meets the public need. The statute of 1890 being out of the way, it is the office of the writ in this case to put the boards of supervisors in motion. The court cannot control their discretion in determining the particular form and manner in which they shall execute the duty imposed upon them so long as they act in good faith. The strictness which formerly prevailed in mandamus proceedings has been greatly modified by statute and the decisions. The alternative writ is now equivalent to the complaint in an action, and the demurrer and return stand as a demurrer or answer in an ordinary suit. If the substantial right is set out in the writ, the proceeding will not fail because the relator asks for too much or mistakes to some extent the relief to which he is entitled. The court, in awarding the peremptory writ, may mould it according to the just rights of all the parties. (Code of Pro. §§ 2067, 2090; *People v. Nostrand*, 46 N. Y. 375; *People v. R. R. Co.*, 58 id. 152; *People v. Wilson*, 119 id. 515.)

The objection that under sec. 7 of chap. 907 of the act of Congress passed Sept. 19, 1890, the boards of supervisors cannot proceed to construct the bridge until the location and plans shall have been approved by the Secretary of War, may excuse them in a proceeding for contempt in case it appears that such consent has been sought in good faith and cannot be procured. We think the existence of this statute does not justify inaction and the matter can be provided for in the peremptory writ, if one shall be issued.

We think the demurrer was not well taken and the order and judgment of the General and Special Terms should, therefore, be reversed, with leave to the defendant to answer on payment of costs.

All concur.

Order and judgment reversed.

RADCLIFFE BALDWIN, Respondent, v. THE SULLIVAN TIMBER
COMPANY, Appellant.

Defendant chartered a steamer to carry a cargo of lumber. The charter party provided that the vessel was to be loaded afloat; the charterer to bring the lumber alongside and load and stow it on the vessel and supply the dogs and chains necessary for handling it, the vessel simply to furnish steam if required to operate the steam winches; the cargo "to be delivered alongside at merchant's risk and expense, and to be received by the master and secured with the ship's dogs and chains when so delivered, and to be then at ship's risk," the charterer's responsibility to cease as soon as the lumber is shipped and bill of lading signed. It was also provided that if the cargo should "not be delivered to vessel," within the time specified, demurrage at a specified rate should be allowed. In an action to recover demurrage it appeared that there was no delay in bringing the cargo alongside, but only in loading and stowing it. Defendant claimed that the delivery, a delay in which, under the charter party, authorized a charge for demurrage, was simply delivery alongside and did not include loading and stowing. *Held*, untenable; that the delivery referred to was the complete and final delivery to the vessel, and this did not occur until the lumber was loaded and stowed and so passed out of the custody and control of the charterer.

After demurrage begins to run, under and pursuant to the terms of a charter party, Sundays are not to be deducted.

(Argued April 11, 1894; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 21, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought by plaintiff, as assignee of the Neptune Steam Navigation Company, to recover damages for an alleged breach of a charter party made between it as owners of the steamship "Albans" and defendant. On the 6th of April, 1888, the agents of the owners and the defendant entered into a charter party agreement, by which the latter chartered the steamer named, for a voyage from the port of Pensacola, Florida, to a port in the United Kingdom or other destination as might be ordered on signing bills of lading.

Among other things it was agreed that the ship should proceed to Pensacola, there load (always afloat) from the charterer a full and complete cargo of sawn boards or deals, the charterer to do the stowing of the cargo, supply dogs and chains, furnish cargo as fast as required for loading, and only such as could go through the ship's hatches, and pay watermen. The cargo "to be delivered alongside at merchant's risk and expense, and to be received by the master and secured by the ship's dogs and chains; when so delivered to be then at the ship's risk." The lay days were to commence the day after the vessel was ready to receive cargo in loading berth and written notice given of such readiness to charterer, "and should the cargo not be delivered to vessel at Pensacola within specified time, for each and every day over and above said lay days, charterers are to pay, day by day, the sum of eighteen pence sterling per net register ton demurrage; any detention through quarantine not to count in lay days." The charter party also contained the following provision: "The charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided the conditions called for in this charter have been fulfilled or provided for by bills of lading." The ship proceeded to Pensacola and loaded, but, the plaintiff claimed, was unnecessarily detained, and he demanded demurrage, or damages in the nature of demurrage, for such detention, in consequence of alleged default in stowing or furnishing cargo as fast as required for loading, and claimed also to recover the expense of towage incurred to enable the steamer to lie afloat, she having been directed by the defendant's agent to a loading berth where she grounded and from which it was necessary to remove her, and also money expended for water and for dogs and chains which the ship was obliged to pay for. In opposition to the claim for demurrage it was urged by the defendant that under the express terms of the charter party no liability exists; that its provisions in that regard are limited to delays occasioned by failure to deliver cargo alongside ship, and nothing being said in the contract concerning

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delay in loading all claim therefor is excluded, and a motion for a non-suit was made on that and the further ground that there was no proof either of default in delivering as fast as possible to the vessel nor of damage for failure to load—the liability for the stipulated amount of demurrage being confined to the specific contingency of neglect to deliver cargo to the vessel. This motion was denied.

L. Laflin Kellogg for appellant. The plaintiff was not entitled to recover in this action, because the proof shows that there was no delay in delivering the cargo as provided for in the charter party within a reasonable time, but that the delay, if any, was caused by the failure to load the cargo after delivery, and this being a duty undertaken by the defendant jointly with the plaintiff, and the charter failing to provide for demurrage in such a case, the recovery cannot be sustained. (*The R. G. Wilson*, 4 Biss. 13; *Burk Edwin v. N. S. C. Co.*, 1 Cliff. 322; *Sandeman v. Scurr*, L. R. [2 Q. B.] 86.) But even if it should be held that the joint duty as to the loading, taken in connection with the express provision for delay in delivering only, does not preclude demurrage for delay in loading, the recovery in this action cannot be sustained, because the plaintiff has alleged a cause of action founded on the express contract made between the parties and has recovered on a cause of action sounding in tort. (*Fulton v. Blake*, 5 Biss. 375; *Cooley on Torts* [2d ed.], 162, 163; *Harris v. Jacobs*, L. R. [15 Q. B. Div.] 277; *Day v. Town of New Lots*, 107 N. Y. 148; *Romeyn v. Sickles*, 108 id. 650; *Wright v. Delafield*, 25 id. 270; *Beard v. Yates*, 2 Hun, 466.) It was error to charge that for the delays in loading under the terms of the charter party the demurrage is fixed at over \$250 a day; and it was also error to refuse to charge that the damages fixed by the charter party were only intended to cover delays in transporting the cargo alongside, and not delay in loading or stowing after its arrival at the vessel. (*Cross v. Beard*, 26 N. Y. 85; *Scholl v. A. J. & S. Co.*, 101 id. 604.) It was error to refuse to instruct the jury

that, in calculating a reasonable time after the commencement of the lay days, the Sundays which intervened should be deducted. (*Lindsay v. Cusimano*, 12 Fed. Rep. 503; *The Oluf*, 19 id. 459.) The objections taken by the plaintiff to the interrogatories as to the custom in loading vessels at the port of Pensacola were improperly sustained. (*M. S. Bacon v. E. & W. T. Co.*, 3 Fed. Rep. 344; *Bartlett v. A Cargo of Lumber*, 41 id. 890; *Gates v. Ryan*, 37 id. 154; *The Elida*, 31 id. 420; *Postlewaite v. Freeland*, L. R. [5 App. Cas.] 599.)

William D. Guthrie for respondent. There was an implied obligation or duty to load within a reasonable time. (*Cross v. Beard*, 26 N. Y. 87; *Melloy v. L. & D. C. Co.*, 37 Fed. Rep. 377.) There being no other evidence upon the subject in the case at bar, the rate of eight pence sterling per ton must be taken as the measure of the ship's damage for any unreasonable delay. (3 Suth. on Dam. [2d ed.] 2040; *Moorson v. Bell*, 2 Camp. 616; *Douglas v. M. Ins. Co.*, 118 N. Y. 484, 486; *Adams v. Fitzpatrick*, 125 id. 124; *Ross v. Hardens*, 79 id. 84, 91; *Smith v. Velie*, 60 id. 106, 110; *Fells v. Vestvali*, 2 Keyes, 152, 153; *Evertsen v. Sawyer*, 2 Wend. 507, 512; *Abeel v. Radcliff*, 15 Johns. 505, 507; *Bradley v. Covel*, 4 Cow. 349, 350; *Dubois v. D. & H. C. Co.*, 4 Wend. 285, 291; *Farron v. Sherwood*, 17 N. Y. 227; *Jones v. Judd*, 4 id. 411; *N. M. Co. v. Stephens*, 127 id. 602.) The court properly ruled that although Sundays and holidays could properly be deducted and allowed within the period of a reasonable time for loading, yet after such reasonable time had expired, the ship was entitled to recover day by day, which includes Sundays and holidays. (3 Suth on Dam. 2040; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25; *Massoth v. D. & H. C. Co.*, 64 id. 524.) The defense of duress and of estoppel is untenable. (*McPherson v. Cox*, 86 N. Y. 472; *Smith v. Holland*, 61 id. 635; *Riley v. Mayor, etc.*, 96 id. 331.) The court below, upon conflicting evidence submitted to the jury the question whether or not the period from April seventeenth to May seventh was more than a reasonable

time in which to load the vessel, and, if so, to what extent. The controversy was essentially an issue of fact for the jury; the question thus raised was clearly within the province of the jury, and their verdict ought not to be disturbed. (*Nolan v. B., C. & N. R. R. Co.*, 87 N. Y. 63, 65; *Fairchild v. Fairchild*, 64 id. 471.) The competency of Elliot, as an expert, was within the discretion of the trial judge. (*Slocovitch v. O. M. Ins. Co.*, 108 N. Y. 56, 62.) The exception to the question: "Had you any knowledge of the rules and regulations of the custom house at Pensacola in regard to clearing vessels?" was untenable. (U. S. R. S. § 4200.) The exception to the admissibility in evidence of the assignment was untenable. (*Stebbins v. Merritt*, 10 Cush. 27; *Academy v. McKechnie*, 19 Hun, 62; *I., etc., R. Co. v. Morganstern*, 103 Ill. 149.) The exception to the introduction of transactions and conversations with Mr. Tobin, as representing the defendant, is not well taken, for Tobin himself was afterwards examined as a witness by the defendant, and stated that he was at the time actually in the defendant's employ and representing it in this very transaction. (*Clark v. Dillon*, 97 N. Y. 370; *Stacy v. Graham*, 3 Duer, 444, 450; 14 N. Y. 492; *Bailey v. New World*, 2 Cal. 370; *Robertson v. French*, 4 East, 130, 137; *Bas v. Steele*, 3 Wash. C. C. 381, 390.) Exclusion of proof of custom to vary contract or contravene rule of law was proper. (*Robbins v. Fuller*, 24 N. Y. 570, 577; *Bradley v. Wheeler*, 44 id. 495, 500; *McMichael v. Kilmer*, 76 id. 36, 44; *Smith v. B. S. Bank*, 101 id. 58, 62; *Hopper v. Sage*, 112 id. 530; *Atkinson v. Truesdell*, 127 id. 230; *Barnard v. Kellogg*, 10 Wall. 383.)

FINCH, J. We should affirm this judgment upon the opinion of the General Term, but for a criticism upon it which seems to require an answer. The whole present contention of the appellant turns upon the distinction asserted, that delivery by the shipper did not include the loading and stowing upon the vessel. Since there was no delay in bringing the timber alongside, but only in loading and stowing it, it is argued that there

was no basis for the demurrage which the charter party contemplated; that if demurrage became due it flowed from a neglect of duty which was outside of the contract, creating a cause of action in tort not pleaded, and to which the contract measure of damages did not apply. The learned counsel for the appellant insists that this view of the case was not met by the General Term, and that its decision was manifestly erroneous.

The effectual answer to this contention lies in a correct construction of the charter party, and a denial of the distinction attempted to be drawn. That instrument should have a reasonable rather than a technical construction, and its general purport should prevail over the narrowness of a single word. The vessel was to be loaded afloat. The charterer was to bring the timber alongside, and load and stow it upon the vessel. The latter was simply to furnish steam if required to operate the steam winches, but the charterer was to do the stowing of the cargo, which it is conceded includes the loading, and to supply the dogs and chains necessary for handling it. There is a further provision that the cargo is "to be delivered alongside at merchant's risk and expense, and to be received by the master and secured with the ship's dogs and chains when so delivered and to be then at ship's risk." This clause was needless if a mere delivery alongside was a complete delivery to the vessel, for after such complete delivery the liability of the ship would of course attach. The need of the provision lay in the fact that delivery alongside was not a complete delivery, because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it, and before that was accomplished the ship would assume no risk unless by force of a particular and specific provision, which, therefore, was added, and which put upon the vessel simply the duty of holding the timber safely alongside to enable the shipper to complete his delivery by loading and stowing. And so when the parties agreed in the terms of their contract that if the cargo should "not be delivered to vessel at Pensacola" within the specified time demur-

rage at a specified rate should be allowed, the delivery referred to is the complete and final delivery, not merely "alongside," but to the vessel, which did not occur until the lumber was loaded and stowed and so passed out of the custody and control of the merchant and into that of the ship. Wherever a delivery "alongside" alone is meant that qualifying word is used, and its omission when "delivery to the vessel at Pensacola" is prescribed in the clause relating to demurrage indicates that a complete delivery to the ship, ending the duty and control of the charterer, was what was meant. .

This construction is supported by a reference to the situation and relations of the parties. The vessel might be delayed not merely by the delay of the merchant in bringing the lumber alongside, but also by his delay in his further contract duty of loading and stowing it. The purpose of demurrage was to compensate the ship for loss of time occasioned by the fault of the merchant, and it is not reasonable to suppose that delay in one respect only was the thought and purpose of the parties when delay in the other would accomplish the same injurious result. This construction of the contract, which was undoubtedly the understanding of the parties at the time of its execution, furnishes a sufficient answer to the principal contention of the appellant.

His exception to the refusal to charge that the three Sundays intervening between the 17th of April and the 7th of May should be deducted was not well taken. The request was too broad. The 17th of April was the end of the lay days and the 7th of May was the date of sailing. Sundays are not to be deducted after the demurrage begins to run. (*Lindsay v. Cusimano*, 12 Fed. Rep. 503; *The Oluf*, 19 id. 459.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HENRY ABEGG et al., Respondents, v. JOHN W. BISHOP et al.,
Appellants.

A preference exceeding in amount one-third of the assets of an insolvent, made by a transfer of property to a *bona fide* creditor just prior to the execution of an assignment for the benefit of creditors, does not under the General Assignment Act (Chap. 508, Laws of 1887), in the absence of any intent to hinder, delay or defraud creditors, vitiate the transfer or assignment.

In case the transfer and the assignment are to be taken together as one transaction, the restraint of the statute does not stamp the greater preference as fraudulent, but simply limits its effective operation to the permissible one-third.

An action, therefore, is not maintainable to set aside the transfer or assignment because of the unlawful preference.

It seems the only remedy is an action, in aid of the assignment and for the benefit of all the creditors, to subject the excess to the claims of creditors under that instrument.

Abegg v. Bishop (86 Hun, 8), reversed.

(Argued April 12, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 30, 1892, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint, and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph A. Welch for appellant Tilge. The transfer by Bishop & Crawford to Tilge & Co. of the accounts delivered to them on account of their debt was not invalidated by the fact that Bishop & Crawford afterward executed a general assignment. (*Manning v. Beck*, 129 N. Y. 1.) This action, for a judgment setting aside the assignment and the payment to the creditors Tilge & Co., cannot be maintained, nor could it be maintained even if the debtors had decided to make an assignment at the time of transferring the accounts to Tilge

142	286
146	40
142	286
149	124
142	286
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168	350

& Co., and the latter had been informed of such an intention. (*C. N. Bank v. Seligman*, 138 N. Y. 435.)

Maurice Rapp for appellant Grasse. The mere creation of the preference in excess of one-third of the assets is not sufficient to render the general assignment void, whether such preference is created by the assignment or extraneous thereto. (*Berger v. Varelmann*, 127 N. Y. 283; *Manning v. Beck*, 129 id. 1; *C. N. Bank v. Seligman*, 138 id. 435.) The burden of proof is upon the plaintiffs. It is incumbent upon them to establish by a preponderance of evidence that the defendants have been guilty of the fraud charged in the complaint. Fraud will not be presumed. (*Schultz v. Hoagland*, 85 N. Y. 464; *Thalheimer v. Klopetsky*, 129 id. 647.) The order of reversal does not state that the reversal was on the facts, and it must, therefore, be presumed here that it was for some error of law. (Code Civ. Pro. § 1338; *Whitman v. Foley*, 125 N. Y. 655.)

Alexander Blumenstiel for respondents. The transfer and assignment are part of the same transaction, and if one is bad both must fall. (*Amisdown v. Manchester*, 40 Barb. 158; *Livermore v. Northrup*, 44 N. Y. 107; *People v. Chalmers*, 60 id. 154; *Percy v. Benedict*, 50 Hun, 282.) The transfer is fraudulent because the debtors in making it were guilty of misappropriation and fraudulent disposition of firm assets. (*Livermore v. Northrup*, 44 N. Y. 107; *Amisdown v. Manchester*, 40 Barb. 158; *D. Ins. Co. v. Van Wagoner*, 132 N. Y. 398; *Warner v. Jaffrey*, 96 id. 248; *Richards v. Thurber*, 105 id. 606.) This action is not an action in aid of the assignment, therefore, it was not necessary for the plaintiffs to have first requested the assignee to commence it. (*Loos v. Wilkinson*, 110 N. Y. 195; *Spring v. Short*, 90 id. 538; *Croze v. Frothingham*, 97 id. 105.)

FINCH, J. This action was brought to set aside a transfer of accounts by Bishop and Crawford to the firm of Tilge &

Co., executed on the 10th of January, 1890, in pursuance of an agreement to that effect made two days earlier; and also to set aside and annul a general assignment executed by the same debtors on the next day. The debt to Tilge & Co. exceeded \$15,000, and no question is made over its honest existence or actual amount. These creditors had obtained a judgment by confession in New Jersey, where the debtors had a factory, but nothing was found there upon which execution could be levied, and that remedy proved unavailable to the creditors. The nominal amount of the accounts transferred was nearly six thousand dollars, but they were subject to discounts and abatement, and have yielded only about sixteen hundred dollars to the holders. The general assignment made on January 11th was without preferences; and the schedules show debts to the amount of over forty thousand dollars, and a total of assets valued at about fifteen hundred dollars. The assignees of the accounts, the general assignee, and the assignors all testify that the final assignment was not determined upon, contemplated, or suggested, until after the transfer of the accounts, and the trial court refused a request to find to the contrary. There was no evidence in the case, and it is not argued that there was any, which tends to prove as a fact an intent to hinder, delay and defraud creditors outside of the bare truth that the transfer of the accounts and the general assignment, taken together as one transaction, show an effort and intent to give Tilge & Co. a preference for more than one-third of the assets of the insolvent debtors, which is in violation of the act of 1877. The Special Term dismissed the complaint, but the General Term reversed that judgment, holding that the transaction was a trick or device to evade the statute against excessive preferences; that as such violation it was a fraud upon creditors; and that both transfers were void on the supposed state of facts, irrespective of the knowledge or intent of the creditors preferred; and this doctrine was confidently pressed as too plain for argument, but in ignorance of a decision of this court not then in the reports.

Nevertheless it is explicitly contravened in all its essential

elements by the decision referred to. The whole subject was discussed in *Central National Bank v. Seligman*, (138 N. Y. 441). In that case there was an assignment of accounts to a creditor on the very day of the execution of the assignment, though before such execution. There were judgments confessed to another creditor although not entered until after the general assignment. The attack was made as here upon these preferences and the assignment, all of which were sought to be set aside as fraudulent and void because they worked a preference in excess of the statutory permission. To that we answered that the mere preference in payment of one honest creditor over another was never at common law evidence of a fraudulent intent; that it was lawful and permissible until the statute restrained it; that in restraining it to one-third of the assets the act did not stamp as fraudulent a greater preference; that it simply limited its effective operation to the permissible one-third; and that the excess when created outside of the assignment could only be recovered by an action in aid of the assignment and for the benefit of all the creditors. The argument of ANDREWS, Ch. J., in which we all concurred, covers the whole ground, and need not be in any respect repeated. As in that case the excessive preference made neither the transfers nor the assignments fraudulent, so they fail to effect that result in this. As we refused to set them aside in that case as fraudulent when no other ground than the forbidden excess existed, so also we must refuse in this. As the only remedy in that case upon the then disclosed facts was an action in aid of the assignment to subject the excess to the claims of creditors under that instrument, so that is the only proper remedy in the case at bar upon the facts contained in the record. It follows that the conclusion of the Special Term was correct and its reversal an error.

The order of the General Term should be reversed and the judgment of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

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FRANCIS SHIELDS, Respondent, v. ALVIN RUSSELL, Appellant.

A wife, to secure a loan to her husband, executed to defendant a deed of land owned by her, he executing to the husband a lease of the land, by the terms of which he agreed to convey the land to the husband by a "good warranty deed and in fee simple," at any time within two years, upon payment of the sum loaned. In an action to compel the execution of such a deed, *held*, that as the deed to defendant was in effect simply a mortgage, the title of the wife was not diverted, and it would be inequitable to compel defendant, in an action to which the wife is not a party, to convey the land to the husband by deed of general warranty; that the scope of the agreement was that defendant, upon payment of the loan, would convey his mortgage interest by deed purporting to convey the land; that he ought not to be compelled to convey with warranty broader in scope than the interest he had; and so, that he should only be required to warrant against his own acts.

The action was brought by plaintiff as assignee of the rights of the husband; the lease contained a provision making it non-assignable without the consent of defendant; the latter claimed that by reason of the assignment his right to the property became absolute. *Held*, untenable, and that plaintiff could maintain the action.

Shields v. Russell (66 Hun, 226), modified.

(Argued April 17, 1894; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought by plaintiff as assignee of all the rights of John S. Elliott, under a lease executed to him by defendant, to compel defendant to execute to him a warranty deed of the premises covered by the lease, or to recover \$2,955.20 and interest as damages.

The lease in question was executed under the following circumstances: On February 4, 1891, Eliza H. Elliott, who owned the fee of certain real estate, to secure a loan to her husband of \$1,000, executed a deed of said real estate, her husband joining with her, to the defendant; at the same time the defendant gave to John S. Elliott a lease of the same

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premises for two years, by the terms of which John S. Elliott was to keep the property insured and in repair, to pay to the defendant sixty dollars a year for rent and not to assign the lease. The defendant agreed that upon the payment of said rent, the performing of the other conditions of the lease and the payment to him any time within two years of the sum named, he would execute and deliver to said John S. Elliott, his heirs and assigns, "a good warranty deed and in fee simple" of the premises. Elliott assigned the lease to plaintiff without the defendant's consent. Plaintiff tendered the money to defendant and demanded a warranty deed, which tender and demand were refused. The judgment required the execution of "a good warranty deed and in fee simple."

Further facts are stated in the opinion.

John P. Kellas for appellant. The court erred in denying defendant's motion to dismiss the complaint made when the trial was moved, and also when plaintiff rested. (Code Civ. Pro. § 499; *Tooker v. Arnoux*, 76 N. Y. 397; *Pope v. T. H. C. & M. Co.*, 107 id. 61.) The deed from Mrs. Elliott to defendant while in form a deed was in fact a mortgage, and defendant took a mortgagee's interest only. (*Drake v. Seaman*, 97 N. Y. 230; *Bonnell v. Griswold*, 89 id. 122; *Schwinger v. Raymond*, 83 id. 192; *Coonley v. Wood*, 36 Hun, 559.) Such being defendant's only interest and plaintiff and Elliott having full knowledge of that interest the court will not compel specific performance. (*Willis v. Ballany*, 21 J. & S. 94; *Aldrich v. Bailey*, 28 N. Y. S. R. 571; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 N. Y. 29; *Lennon v. Stiles*, 24 N. Y. S. R. 390; *Roos v. Lockwood*, 59 Hun, 181; *Sternberger v. McGovern*, 56 N. Y. 12.) The court has found that the deed to defendant was executed not only as security but to vest in him the power to convey the land to John S. Elliott. These findings are unsupported by evidence and are not warranted. (*Bonnell v. Griswold*, 89 N. Y. 122; *Schwinger v. Raymond*, 83 id. 192; *Smith v. Jackson*, 11 Hun, 361; *Despard v. Walbridge*, 15 N. Y. 374; *Hutchins v.*

Hutchins, 98 id. 56; *Drake v. Seaman*, 97 id. 230; *McCauley v. Smith*, 132 id. 534; *Shattuck v. Bascom*, 105 id. 39; *Odell v. Montrose*, 68 id. 504; *Baker v. U. M. L. I. Co.*, 43 id. 289; *Place v. Hayward*, 117 id. 496; *N. Y. R. Co. v. Rothery*, 107 id. 310; *Morrison v. Brand*, 5 Daly, 42; 56 N. Y. 657; *Dren v. Milne*, 15 Abb. [N. C.] 350.) There is no foundation laid in the complaint for a recovery on the ground of a power granted to defendant to convey the premises to John S. Elliott. (*Coster v. Mayor, etc.*, 43 N. Y. 403.) The lease by its terms was non-assignable without defendant's consent in writing, and that consent not having been given, specific performance cannot be compelled by plaintiff. (*Jackson v. Silvernail*, 15 Johns. 278; *Jackson v. Harrison*, 17 id. 66; *Cranston v. Wheeler*, 37 Hun, 77; *Sternberger v. McGovern*, 56 N. Y. 12; *Pratt v. Ogden*, 34 id. 20; *Pierrepoint v. Barnard*, 6 id. 295; *Suydam v. Jones*, 10 Wend. 184; *Barnard v. Darling*, 11 id. 29; *Delacroix v. Buckley*, 13 id. 71; *Eddy v. Graves*, 24 id. 32; *Allen v. Jaquish*, 21 id. 628; *Horgan v. Krumweide*, 25 Hun, 117; *Rockwell v. Saunders*, 19 Barb. 473; *Welsh v. Taylor*, 50 Hun, 137.) The court erred in finding that Eliza H. Elliott has not made and does not make any claim against defendant. (Code Civ. Pro. § 993; *Barry v. Hamberg Ins. Co.*, 110 N. Y. 6; *Sickles v. Flanagan*, 79 id. 224.) The court erred in finding that John S. duly sold and assigned the lease to plaintiff. (Code Civ. Pro. § 993; *Sickles v. Flanagan*, 79 N. Y. 224.) The court erred in refusing defendant's objections to and denying his motion to strike out the evidence of Eliza H. Elliott concerning private interviews between herself and husband in the absence of defendant. (*Finney v. Gallaudett*, 19 N. Y. S. R. 823.) The court erred in granting an additional allowance of costs to plaintiff. (Code Civ. Pro. § 3253; *H. F. Ins. Co. v. G. Ins. Co.*, 18 N. Y. Supp. 50.)

John P. Badger for respondent. Whenever property is transferred, no matter in what form or by what conveyance, as a security for a debt, the transferee takes merely as a mort-

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gagee, and has no other rights or remedies than those the law accords to mortgagees. (*Barry v. H. B. F. Ins. Co.*, 110 N. Y. 5; *Carr v. Carr*, 52 id. 261.) In the case of a mortgage, the mortgagor, although he has not strictly complied with the terms of the mortgage, still has the right to redeem. (*Matthews v. Sheehan*, 69 N. Y. 590.) The defendant being only a mortgagee, so far as his own interest in the property was concerned, and having no rights or remedies with respect to the property, other than as such, the relation of landlord and tenant never existed between him and Elliott. (*Barry v. H. B. F. Ins. Co.*, 110 N. Y. 5; *Carr v. Carr*, 52 id. 261.) Such being the relation of the defendant to Elliott and the property, he had no interest in the covenant not to assign, to give it support or validity. (*Cranston v. Wheeler*, 37 Hun, 68.) It matters not that Elliott did not absolutely promise to pay the \$1,000; it is not necessary in order to constitute a valid mortgage that the mortgagee should have any other remedy but that upon his mortgage. (*Matthews v. Sheehan*, 69 N. Y. 590, 591.) The agreement not to assign without the written consent of the defendant did not change the character of the deed so as to make it anything but a mortgage; "once a mortgage always a mortgage." (*McCauley v. Smith*, 44 N. Y. S. R. 850.) If any effect were to be given to that agreement it could only be held applicable to Elliott or his assignee's right to occupy the premises till the \$1,000 and interest were paid or tendered. It could not work a forfeiture of his or the plaintiff's right at any time within two years to pay the amount and claim the deed of the premises. (*Cranston v. Wheeler*, 37 Hun, 68, 69.) That agreement, if intended to apply to the defendant's covenant to convey the premises to Elliott, or to his assigns, at any time within two years upon payment of the debt, and that his interest in the property worth \$1,850, as found by the court, should not be sold without the defendant's written consent, was in restraint of the power of alienation, and was void. (*Cranston v. Wheeler*, 37 Hun, 68; *DePeyster v. Michael*, 6 N. Y. 467, 506, 508.) The covenant not to assign was an agreement on

the part of Elliott, and not a condition which would prevent him or his assigns from tendering performance, and specific performance should be decreed. (*Cranston v. Wheeler*, 37 Hun, 68, 69, 74.) Covenants of this kind have never been enforced except in the case of mere leases, and are always to be construed strictly as against the lessor. (*Livingstone v. Stickles*, 7 Hill, 254, 256; *Jackson v. Silvernail*, 15 Johns. 279; *Jackson v. Harrison*, 17 id. 66, 71; *Cranston v. Wheeler*, 37 Hun, 68, 69; *Lynde v. Hough*, 27 Barb. 423.) Defendant is estopped from claiming a forfeiture of the lease. (*Murray v. Harway*, 56 N. Y. 342; *Ireland v. Nichols*, 46 id. 416.) Where deeds absolute on their face are given as security for debt, upon the payment or tender of the amount a re-conveyance will be decreed as evidence of the mortgagor's title. (*Odell v. Montross*, 68 N. Y. 504; *Blazy v. McLean*, 35 N. Y. S. R. 411.) As the defendant did not plead his inability to convey to plaintiff because he was only a mortgagee of the property, and the title thereto was still in Mrs. Elliott, he cannot raise it now. (Code Civ. Pro. § 500.) There is no claim that Mrs. Elliott did not have a perfect title to the property at the time she executed the deed to defendant, and as she could transfer to the defendant a power to do anything that she could have done herself, it follows, therefore, that the defendant took under the deed full power to convey by warranty deed in fee. (4 R. S. [8th ed.] 2445, § 74.) The declaration of trust (lease) is presumed to express the purpose of the conveyance. Both may be treated as if embraced in one instrument. (*Knowlton v. Atkins*, 47 N. Y. S. R. 621, 622; *Ambrose v. Gibbons*, 42 id. 527, 530.) The court will presume that the defendant could have obtained his wife's signature (if it had been necessary) unless it affirmatively appears that she refused, or that he was unable to do so. The court will also presume that the defendant is able to give a good warranty deed in fee simple, unless the contrary is pleaded and appears. (*Northrup v. Gibbs*, 17 N. Y. S. R. 320, 322; *Martin v. Colby*, 3 id. 420, 421.) The wife of the defendant was not a necessary party in this action. (*Martin v. Colby*, 3 N.

Y. S. R. 415, 416.) The decree requiring the defendant to make, execute and deliver to the plaintiff the deed provided for in this agreement was proper, as it will be presumed that (if it were necessary) he can procure his wife's signature. (*Northrup v. Gibbs*, 17 N. Y. S. R. 322, 323.) Elliott's right or interest in the premises was precisely the same as though he held under a contract for the purchase thereof, at the price of \$2,850, and had paid \$1,850 thereon. He was the equitable owner to that extent. (*Creighton v. H. F. Ins. Co.*, 17 Hun, 80.) The deed and lease vested the property in Elliott, subject to the defendant's mortgage. (*Rawson v. Lapman*, 5 N. Y. 456, 460, 461, 462.) The execution of the lease by the defendant was a sufficient declaration of the trust, as much so as though it had been contained in the body of the deed to the defendant (which it was in effect). (*McArthur v. Gordon*, 21 N. Y. S. R. 359, 653, 662; *Cook v. Barr*, 44 N. Y. 156, 159, 160; *Hutchins v. Van Vechten*, 140 id. 118, 119.) If it were to be held that the trust created, or attempted to be by the deed and lease, was not valid as an express trust, then it is valid as a power in trust. (*Clark v. Crego*, 47 Barb. 599, 614; 51 N. Y. 646; 4 R. S. [8th ed.] 2438, §§ 58, 103; *N. Y. D. D. Co. v. Stillman*, 30 N. Y. 190, 191; *Fellows v. Heermans*, 4 Lans. 237, 228; *Heermans v. Robertson*, 5 T. & C. 599; *Mannice v. Mannice*, 43 N. Y. 364; *Hotchkiss v. Elting*, 36 Barb. 45, 46.) The defendant being the grantee of a power in trust can be compelled to execute it. (*Clark v. Crego*, 47 Barb. 614; 51 N. Y. 646; *N. Y. D. D. Co. v. Stillman*, 30 id. 191; *Mannice v. Mannice*, 43 id. 364; *Downing v. Marshall*, 23 id. 380, 381; *Hotchkiss v. Elting*, 36 Barb. 45, 46; *White v. Howard*, 52 id. 316; *Fellows v. Heermans*, 4 Lans. 234, 238; 4 R. S. [8th ed.] 2438, § 58.) The power in trust having been duly granted by Mrs. Elliott, she could not revoke it, or prevent the defendant from executing it. (4 R. S. [8th ed.] 2449, § 108; *Marvin v. Smith*, 46 N. Y. 577.) It is no objection to a decree of specific performance that the defendant did not have the legal title to the premises, and cannot, therefore, convey. The donee or grantee of a power in trust

never has the title, only the power to convey. (4 R. S. [8th ed.] 2438, § 58; *Weeks v. Cornwall*, 104 N. Y. 338, 339; *Cooke v. Platt*, 98 id. 38.) The finding of the court that defendant took a mortgagee interest only in the property is not inconsistent with the finding that the deed vested in him the power to convey to John S. Elliott or his assigns, as the grantee of a power in trust takes no interest whatever in the subject of the power. (4 R. S. [8th ed.] 2438, § 58; *Weeks v. Cornwall*, 104 N. Y. 338, 339; *Cooke v. Platt*, 98 id. 38.) It was proper to show the agreement between Mrs. Elliott and her husband that the property should be conveyed to him when the loan was paid, as the defendant became a party to it by subsequently executing the instrument to effectuate it. (*Lennon v. Styles*, 24 N. Y. S. R. 392.) The case was a difficult and extraordinary one, and the court had full knowledge of that fact, from the evidence and proceedings before it on the trial. (Code Civ. Pro. § 3253.) There is no force in the objection that the decision making the allowance was not made by the court but by the judge; the court, as such, continued with respect to that case until the decision was rendered. (Code Civ. Pro. § 1010.) If it were a fact that the order was made by the judge and not by the court, still it being an equity case, the judge had the power to award an extra allowance in the conclusions of law. (*Gueney v. U. T. Co.*, 29 N. Y. S. R. 278.) The whole question of the allowance rested substantially in the judgment and discretion of the court, and, as it must be apparent that it was a meritorious one, the appellate court should not interfere. (*Morrison v. Agate*, 20 Hun, 24, 25; *Bryan v. Durrie*, 6 Abb. [N. C.] 140.)

Per Curiam. We think the judgment should be modified so as to limit the warranty in the deed directed to be executed by the defendant, to a warranty against his own acts. The redemption lease was a part of the transaction between Mr. and Mrs. Elliott and the defendant. By its terms the defendant agreed in substance to convey the land to John S. Elliott

upon his paying to the defendant the sum loaned with interest, at any time within two years after the execution of the lease, by a "good warranty deed and in fee simple." But the deed executed by the wife being in law a mortgage, her title to the land was not divested thereby, and it would be inequitable to compel the defendant, in an action to which the wife is not a party, to convey the land to the husband by deed of general warranty. The substance of the agreement between the defendant and John S. Elliott was an undertaking on the part of the defendant to convey his mortgage interest to the husband by deed purporting to convey the land on his paying the amount for which he held the land as security. The scope of the warranty to be given should be limited as above stated, and the transaction was, as is found and as is now conceded by both the parties to the action, a loan of one thousand dollars by the defendant to the plaintiff, or to the plaintiff and his wife, upon the security of the wife's land, and that the deed was in fact a mortgage. The court ought not to compel the defendant to convey with a warranty broader in scope than the interest which he had, the situation being known to all the parties to the transaction at the time the agreement was executed. The plaintiff is willing to accept specific performance on the terms indicated, and the defendant now professes to be willing to perform the agreement if he shall be relieved from the obligation to convey with general warranty. He insisted in his answer and on the trial that his right to the property had become absolute by reason of the lease having been assigned without his consent, contrary to a covenant therein. But this claim is without foundation as is satisfactorily shown in the opinions delivered at the Special and General Terms. It is found that the wife on the trial disclaimed any title to the premises. But her title has never been conveyed by any deed or writing, and such a parol disclaimer, or any circumstances tending to raise an estoppel against her, leaves the matter so uncertain that the defendant ought not to be compelled to convey upon the assumption that her title has been divested, or upon the ground that an implied power

to convey the fee was vested in the defendant under the lease and the deed of the wife executed contemporaneously therewith.

The judgment should be modified in accordance with this opinion, and as modified affirmed.

The attitude of the defendant in the litigation has been such that we think he should not be relieved from payment of costs, notwithstanding the judgment is modified in his favor.

Judgment modified, and as modified affirmed, with costs.

All concur.

Judgment accordingly.

AGNES S. LYON, an Infant, etc., Respondent, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

In construing amendments to a statute the original act with all its amendments must be read together and viewed as one act passed at the same time, and no part of the original or the amendments is to be held inoperative if they can all be made to stand and work together.

The amendment of the section of the Code of Civil Procedure in reference to the form of the order for taking the deposition of a party or witness before trial (§ 873) made in 1898 (Chap. 721, Laws of 1898), which, after providing that "In every action brought to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons," also provides that "Where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination shall be made," does not violate any of the express or implied restraints upon the legislative power to be found in the Federal or State Constitution. Such amendment, however, does not authorize an order directing a physical examination apart from or independent of an examination of plaintiff as a witness before trial.

(Argued April 23, 1894; decided May 1, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made

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March 9, 1894, which reversed an order of Special Term directing a physical examination of the plaintiff before trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Julien T. Davies for appellant. The learned General Term erred in reversing the order on the ground that the statute does not provide for a physical examination apart from the plaintiff's examination as a witness at the instance of the defendant. (Laws of 1893, chap. 721; Code Civ. Pro. §§ 872, 873.) The order of the Special Term was in the form prescribed by the statute. (Code Civ. Pro. §§ 872, 873; *Jenkins v. Putnam*, 106 N. Y. 276; *Herbage v. City of Utica*, 109 id. 81; *Glenny v. Stedwell*, 64 id. 120; *Carter v. Good*, 57 Hun, 116; *Wahle v. McMillan*, 2 Misc. Rep. 343.) The statute providing for a physical examination is constitutional, the legislature having conferred the power which the Court of Appeals has held did not exist at common law. (*McQuigan v. D., L. & W. R. R. Co.*, 129 N. Y. 50; *Botsford v. U. P. R. R. Co.*, 141 U. S. 250.) The object of the statute in providing for a physical examination of the plaintiff is to furnish evidence at a trial to enable the court to determine an important question in the controversy, namely, the amount of damages to be awarded, and is analogous to the unchallenged powers of the courts to compel discovery, long exercised in many cases. (*Salisbury v. Howe*, 87 N. Y. 128; *Gindrat v. People*, 138 Ill. 103; *State v. Grow*, 107 Mo. 341; *Richards v. State*, 82 Wis. 172; *Andrews v. Youmans*, 82 id. 81; *S. L., etc., R. Co. v. Claunch*, 41 Ill. App. 592; *Stewart v. C., etc., R. Co.*, 89 Mich. 315; *Springer v. City of Chicago*, 135 Ill. 552; *Alberti v. N. Y., L. E. & W. R. Co.*, 118 N. Y. 77; *Blair v. Pelham*, 118 Mass. 420; *Baker v. Perry*, 67 Iowa, 146; *D. G. M. Co. v. Taussig*, 33 Hun, 32; *Haynes v. Hatch*, 39 N. Y. S. R. 805; *Blocker v. Guild*, 15 Daly, 348; *E. M. Co. v. Hazzard*, 26 J. & S. 556; *Gilpin v. Daly*, 59 Hun, 413; *In re Coleman*, 111 N. Y. 220; *People v. Schuyler*, 106 id. 298; *Edington v. Æ. Ins. Co.*, 77 id. 564;

Marx v. M. R. Co., 56 Hun, 575; *Treanor v. M. R. Co.*, 14 N. Y. Supp. 270; *Devenbagh v. Devenbagh*, 6 Paige, 175; *Le Barron v. Le Barron*, 35 Vt. 365; *Newell v. Newell*, 9 Paige, 25; *Anon. v. Anon.*, 89 Ala. 291.) The power to order a physical examination of the plaintiff has been held to be inherent by the tribunals of thirteen states, and the claim here made, that the legislature could not confer the power, is, obviously, without merit. (*Schroeder v. C., R. I., etc., R. Co.*, 47 Iowa, 375; *White v. M., etc., R. Co.*, 61 Wis. 536; *A. G. S. R. Co. v. Hill*, 90 Ala. 71; *Sibley v. Smith*, 46 Ark. 295; *C., etc., R. R. Co. v. Holland*, 122 Ill. 461; *Hatfield v. S. P., etc., R. Co.*, 33 Minn. 130; *Lloyd v. R. R. Co.*, 53 Mo. 509; *Sidekum v. W. S. L. & P. R. Co.*, 93 id. 400; *Owens v. K. C., etc., R. Co.*, 95 id. 169; *Shepherd v. M. P. R. Co.*, 85 id. 629; *M., etc., R. R. Co. v. Johnson*, 72 Tex. 95.) The statute compelling a physical examination of the plaintiff will act as a potent means of preventing injustice by enabling the courts to learn the truth in regard to the extent of the alleged injuries. (*Hagenlocher v. C. I. & B. R. R. Co.*, 99 N. Y. 137; 1 Taylor on Ev. [6th ed.] 49; *Tracy Peer*, 10 Cl. & Fin. 191; *Roberts v. N. Y. E. R. R. Co.*, 128 N. Y. 457.)

Nelson Smith for respondent. In the absence of a statute, a defendant is not entitled to a physical examination of the person of the plaintiff in an action to recover damages for personal injuries. (*McQuigan v. D., L. & W. R. R. Co.*, 129 N. Y. 50; *U. P. R. Co. v. Botsford*, 141 U. S. 250; *Roberts v. O. & L. C. R. R. Co.*, 29 Hun, 154; *Newman v. T. A. R. R. Co.*, 28 J. & S. 412; *S. C. R. R. Co. v. Finlayson*, 16 Neb. 578-588; *Lloyd v. R. R. Co.*, 53 Mo. 515.) The order that the plaintiff submit to a physical examination, and the statute upon which it is founded, would violate the rights of the plaintiff, secured by the Federal Constitution, to sue for the injuries she has sustained, and have her case tried. (*Corfield v. Coryell*, 4 Wash. C. C. 380, 381; *Slaughter House Cases*, 16 Wall. 75, 76; *In re Ah Fong*, 3 Sawyer's C. C. 145,

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157; *Ward v. Maryland*, 12 Wall. 430; *U. P. R. Co. v. Botsford*, 141 U. S. 552; *Boyd v. U. S.*, 116 id. 616, 624, 627; Cooley on Const. [4th ed.] 715, 716; *Smith v. Turner*, 7 How. [U. S.] 283, 410-464.) The order directing the physical examination would violate the right of liberty secured to the plaintiff by article 14 of the Federal, and article 1, section 6, of the State Constitution. (*People v. Marx*, 99 N. Y. 386; *Bertholf v. O'Reilly*, 74 id. 515; *In re Jacobs*, 98 id. 98.) Assuming that a person may be deprived of the right to sue in the courts by due process of law, the order directing the physical examination is not "due process of law," and is, in its nature, an extra-judicial proceeding. (*Taylor v. Porter*, 4 Hill, 140; *Hurtado v. California*, 110 U. S. 521; *White v. White*, 5 Barb. 481; *Roberts v. O. R. Co.*, 29 Hun, 158.) The inspection in suits for nullity of a marriage contract, on the ground of impotence, bears no analogy to the physical examination claimed in actions for personal injuries. (*U. P. R. Co. v. Botsford*, 141 U. S. 250; Bishop on Mar. & Div. §§ 1298, 1299, 1308, 1309.) The order in question is not appealable. (*Brooks v. M. N. C. Co.*, 93 N. Y. 647; *Harriis v. Burdett*, 73 id. 136.)

O'BRIEN, J. The complaint in this action alleges that in the month of October, 1892, the plaintiff, a young girl then under age, was a passenger upon one of the defendant's trains, and that she was seriously injured by reason of a collision, such injury affecting the spinal column and whole nervous system. These allegations were put in issue by the answer. The defendant obtained an order from one of the judges of the court in which the action was pending, directing the plaintiff to appear before a referee named in the order, at her residence, at a date designated, and then and there submit to a physical examination in respect to the nature and extent of the injuries claimed, to be conducted by two medical experts named, in the presence of such women as she might desire to have present, but not in the immediate presence of the referee, unless the plaintiff should so elect. The General Term has

reversed the order, and this appeal brings the questions here for review. The ground upon which the order was reversed is that the defendant was not entitled to an order for such an examination except at the time of granting one for her examination as a witness or a party before the trial, and that a separate physical examination alone is not authorized. On the argument before us in support of this reversal, the learned counsel for the plaintiff does not rest the case wholly upon the reasons given by the General Term, but attacks the statute as in conflict with the Federal and State Constitutions. He insists that such conflict arises from the fact that the plaintiff is required, as a condition of prosecuting her action in the courts, to expose her person against her will. That the statute in effect interferes with the sacredness and privacy of her own person, and deprives her of her liberty and natural rights and the equal protection of the laws. The argument, though perhaps novel, and subject to the objection that it seeks to push a principle to extremes, is not without interest on account of the ideas advanced and the manner of their presentation. In the view we take of the questions involved in the appeal, it will not be necessary to follow the discussion. The statute enacts a rule of procedure, the purpose of which is the discovery of the truth in respect of certain allegations which the plaintiff has presented for judicial investigation in the courts of justice. It prescribes a method of aiding the court and jury in the correct determination of an issue of fact raised by the pleadings, and, as it seems to me, does not violate any of the express or implied restraints upon legislative power to be found in the fundamental law. But, in regard to the meaning and construction of the statute, I think the court below was entirely correct. The general purpose of the enactment was to change a rule of the common law which had recently been asserted by the highest court and by this court. (*The Union Pacific Railway Co. v. Botsford*, 141 U. S. 250; *McQuigan v. D., L. & W. R. R. Co.*, 127 N. Y. 50.)

It is not necessary in this case to insist that the statute should be subjected to a strict construction, but certainly it

ought to receive a construction that would make it fair and reasonable in its operation. By chapter 721 of the Laws of 1893, section 873 of the Code of Civil Procedure was amended by inserting the following provision in the middle of that section :

“In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper.

“In every action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made.”

The learned counsel for the plaintiff contends that under the section as now amended, the physical examination is not authorized apart from or independent of the examination before trial, while the learned counsel for the defendant contends that the second clause of the amendment provides for a mere physical examination, distinct and apart from the other words of the amendment, and from the preceding or subsequent sections of the Code. In other words, he separates this clause from the rest of the section and from the other sections relating to examinations of parties, and insists that it contains within itself everything necessary to its execution as an independent enactment. I take it to be a settled rule of statutory construction that an original statute with all its amendments must be read together and viewed as one act passed at the same time. (*Goldman v. Kennedy*, 49 Hun, 157.) No part of the original or the amendment is to be held inoperative if they can all be made to stand and work together. I assume that had section 873 as now amended been originally enacted in its present form, no one would claim that it should

then receive the construction now claimed in behalf of the defendant, and yet we must read it and the other sections on the same subject as if they had been passed in the present form at the same time.

But the most serious objection to the defendant's construction is, that under it, it would be utterly impossible to attain the end which the legislature had in view, and it would, in fact, defeat every practical and useful object sought to be accomplished. The section, as amended, provides that the examination shall be had before the judge or a referee, and a referee was actually appointed in the order in this case and the plaintiff directed to appear before him. For what purpose? If the defendant's construction be correct, he could not administer an oath to any one, or ask a single question, or make any report of the proceeding. He could not even be present at the examination unless the plaintiff required it. The plaintiff might stand mute and no one could compel her to answer a single question put by the medical experts or any one else. The experts are not required to reduce anything to writing or make any report to the court, and no provision is made for a record by any one. All the defendant can get from the proceeding upon this construction is an opportunity to have two physicians inspect the plaintiff's person as to any external marks or symptoms of injury or disease, for the purpose of enabling them to testify at the trial, it may be years afterwards. The defendant's counsel cannot even know in advance of the trial what testimony the experts can give, whether for or against him, unless, after an appointment by the court, they should volunteer to disclose to him the results of their observation, and this might not be regarded as entirely proper on their part, as they were in some sense officers of the court, or at all events, impartial as between the parties, a character that they should preserve in order to give to their testimony much weight at the trial. So that when the proceedings are finished practically nothing has been accomplished. The parties have not advanced much in the process of discovering where the truth is. They are for all practical purposes just where they started.

Moreover, how is it possible for medical experts to make a physical examination in a case like this, or indeed in most cases, by merely observing the external marks or indications of personal injury or disease? The term itself implies not only such observation, but an inquiry by means of questions and answers as to the cause, nature, character and extent of the disability. Mere external appearances are, in themselves, of no consequence unless identified and connected with the accident as the cause, and, hence, disclosures such as ordinarily occur between patient and physician must necessarily accompany the inspection of the injured parts. It is clear, I think, that such an examination as the statute contemplates can never be obtained under the defendant's construction. It must be held that the legislature intended to enact some useful and practical rule in the administration of justice, that would promote the discovery of truth and not to do a vain thing. In order to reach this simple and just result all we need do is to read the amendment as a part only of the general scheme prescribed by the Code for the examination of parties before trial. In order to give even color to the other view it must be detached from the context and from all its surroundings, and read as if it stood alone, in disregard of settled rules of construction. We must reject provisions of the same section, and other sections on the same subject, of the plainest import, as wholly inapplicable to this particular examination. The statute has in terms provided that the physical examination shall be procured in the same way and as part of an examination of the party before trial, and in that way only and by conforming to the general provisions of law on the subject can the object and purpose of the amendment ever be attained. This construction gives effect to every word of the section as amended, and is in harmony with the other sections immediately preceding and following it. Then the referee becomes something more than a mere spectator at an idle ceremony. He may take the plaintiff's testimony upon the issue and report to the court as upon an examination before trial. He has, of course, power to administer an oath and to authenticate the proceedings, and the

plaintiff is bound to appear before him and answer all proper questions with respect to the nature and extent of the injuries, whether framed by the medical experts from their own examination or as a part of it, or by the counsel present. It becomes a fair struggle for truth, and both parties may participate. The record of the examination is placed on file, and both sides know what must be met if it is introduced in evidence, as it may be. The statute upon this construction becomes a valuable accession to the rules for administering justice, and not an instrument to be used by one party to surprise his antagonist at the trial, or, in some cases, possibly himself. That this is the fair and reasonable, and, indeed, the necessary construction of the section as it now stands, I cannot doubt. Moreover, the other view would, in the end, be most unfortunate for the defendant and parties situated as the defendant is. We know that in actions of this character brought by women against corporations considerations sometimes influence the jury, other than those growing out of the law and the facts applicable to the case. When facts are found upon conflicting evidence and damages assessed, the accuracy of the mental process upon which the jury acted cannot ordinarily be reviewed. It is not desirable to increase the chances of injustice by adding new elements that are liable to be used at the trial against corporations in this class of actions. Mr. Justice GRAY, in the Supreme Court of the United States in the case of *The Union Pacific Railway Co. v. Botsford* (*supra*), remarked that "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass." This amendment has changed the law, but it is not so certain that it will ever change the general sentiment of mankind which was expressed in that remark. The power conferred by the amendment should never be used in such a way as to leave any doubt as to the fairness and good faith of the proceeding, otherwise it may prove to be a sword

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instead of a shield. It should be a fair and open inquiry after truth, in which both sides are or may be actors. If it is used only for the purpose of enabling the defendant to prepare expert witnesses to give testimony at the trial it will be hardly possible to keep the fact from the jury, and it is easy enough to see how such an element in the case might be used to excite sympathy, stimulate prejudices, and in some cases possibly to enhance damages.

The order appealed from should be affirmed, with costs.

All concur, except EARL, FINCH and BARTLETT, JJ., dissenting.

Order affirmed.

EPHRAIM C. GATES et al., Appellants, v. JAMES C. DE LA MARE, Respondent.

The lien of a mortgage attaches not only to the land in the condition it was at the execution of the mortgage, but to everything which, during its existence, becomes by annexation a part of the realty.

When land is acquired by the city of New York for street purposes, all pre-existing titles and interests become extinguished, the award of the commissioners of estimate and assessment standing as a substitute for the land taken, and when the lands taken are mortgaged, the mortgagee is entitled to have the award applied upon his mortgage to the extent necessary for his protection.

In June, 1888, commissioners of estimate and assessment were appointed to acquire title to lands in the city of New York for a street that was laid out through the lands of D., which were then covered by a mortgage. In November, 1888, D. entered into an agreement with defendant, an attorney, authorizing the latter to take proceedings to have any award made to D. for the land taken for the street increased, and agreeing to pay him for his services one-fourth of any increase. In February, 1890, the commissioners made their preliminary report making an award for the land taken. Defendant thereupon appeared before the commissioners, and, by his efforts, the award was increased \$3,484. The final report of the commissioners was confirmed May 1, 1891. After the date of the first report, but before its confirmation, an action was commenced to foreclose the mortgage: the city was not made a party. In March, 1891, judgment of foreclosure and sale was entered; in April the whole of the mortgaged premises were sold pursuant to the judgment, and a deed was executed to the purchaser May 25, 1891. In

142	307
144	300

142	307
j 154	409
j 154	421

142	307
171	457

an action to determine who was entitled to the award, upon which defendant claimed a lien under said agreement, *held*, that the mortgage was the paramount lien ; that the mortgagee, not having been a party to the agreement with defendant, was not bound thereby ; that as the sale was before the confirmation of the commissioners' report, and so before the city acquired title (§ 900, chap. 410, Laws of 1892), the purchaser by his deed took title to all the mortgaged premises, and as when the city acquired title the award stood as a substitute for so much of the land purchased as was taken by the city, the purchaser's deed operated to carry the award, and although this was increased by defendant's services, the purchaser was entitled to the whole thereof.

Home Ins. Co. v. Smith (28 Hun, 296), distinguished.

(Argued April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed an interlocutory judgment, entered upon an order of Special Term, overruling plaintiffs' demurrer to the answer herein, and directed a final judgment in favor of defendant.

The question presented upon this appeal arises upon the following facts: September 16, 1887, one Denninger, being the owner of certain lands in the city of New York, on that day executed, together with his wife, to the Harlem Savings Bank a mortgage thereon for \$5,000. Afterwards proceedings were instituted in behalf of the mayor, aldermen and commonalty of the city of New York for the purpose of acquiring title to lands required for Melrose avenue, which was laid out through the lands of Denninger. On June 7, 1888, commissioners of estimate and assessment were appointed in the proceedings. On November 16, 1888, Denninger entered into an agreement, in writing, with the defendant, an attorney of the court, whereby he authorized him to take proceedings to have any awards which might be made to Denninger for the part of his property to be taken for the avenue increased, and any assessment upon any of his property reduced, and agreed that in case the defendant should succeed "in obtaining any increase of such awards, or reduction of such assessments, to pay him (defendant) one-quarter of the amount of such

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increase or reduction." The commissioners made their preliminary report, of which notice was given February 14, 1890, in which they awarded to Denninger for the part of his land to be taken for the avenue the sum of \$8,100. The defendant thereupon appeared before the commissioners, and as the result of his efforts the award was increased \$3,484 over that originally made. The final report of the commissioners was dated Oct. 1, 1890, and was confirmed by order of the court May 1, 1891. Meanwhile, on February 4, 1891, after the date of the final report, but before its confirmation, an action was commenced against Denninger and others for the foreclosure of the mortgage to the Harlem Savings Bank. The city of New York was not made a party to the foreclosure action. March 28, 1891, judgment of foreclosure and sale was entered. April 21, 1891, the mortgaged premises were sold at public sale, pursuant to the judgment, to one Jacob L. Toch. The amount bid does not appear. The sum ascertained by the judgment to be due on the mortgage was \$5,461.73. May 25, 1891, the referee appointed in the foreclosure judgment to make the sale executed to the purchaser a deed in which was recited the prior judgment and proceedings and which purported to convey to Toch the whole premises embraced in the mortgage to the Harlem Savings Bank. The city has paid into court the amount of the award made to Denninger. The defendant claims a lien on the award under his agreement with Denninger of Nov. 16, 1888, to the extent of \$871, with interest, that being one-fourth of the increase of the final award over the original award made by the commissioners.

The plaintiffs, who have succeeded to the rights of Jacob L. Toch, the purchaser on the foreclosure sale, claim that by his purchase and the conveyance made pursuant thereto, the title to the whole award became vested in him, free from any lien in favor of the defendant.

George W. Stephens for appellants. At the time of the foreclosure sale the city had not yet acquired any title to the land

for which this award was subsequently made. (Laws of 1882, chap. 410, § 990; *In re Eleventh Ave.*, 81 N. Y. 436.) The entire premises, including the portion subsequently taken for Melrose avenue, were properly sold by the referee without regard to the pending condemnation proceedings. (Laws of 1882, chap. 410, § 990.) The referee's deed, although delivered after the confirmation of the commissioners' report, vested in the purchaser as full and perfect a title to the award as though it had been delivered before such confirmation. (*Engelhard v. City of Brooklyn*, 3 Misc. Rep. 30; *Banks v. Roberts*, 44 N. Y. 192; *McLaren v. H. Ins. Co.*, 5 id. 151; *Sears v. Burnham*, 17 id. 455.) The defendant was not a necessary or proper party to the foreclosure suit (*Randall v. Van Wagener*, 115 N. Y. 527; *Pulver v. Harris*, 52 id. 73; *Platt v. Jerome*, 19 How. [U. S.] 384; *Martin v. Hawks*, 15 Johns. 405; *People ex rel. v. N. Y. C. P.*, 13 Wend. 652.) This appeal was properly taken. (Code Civ. Pro. § 1336.)

James C. De La Mare for respondent. The defendant had an equitable lien upon the award for services in procuring the increase. (*McGregor v. Comstock*, 28 N. Y. 237; *Ely v. Coke*, Id. 265, 372, 373; *Marshal v. Meech*, 51 id. 141, 143; *Wright v. Wright*, 70 id. 140; *Coughlin v. N. Y. C. R. R. Co.*, 71 id. 443, 448; *Fairbanks v. Sargent*, 104 id. 108; 117 id. 320; *Boyle v. Boyle*, 106 id. 654; *Chester v. Jumell*, 125 id. 237; *Harwood v. La Grange*, 137 id. 538; *Overton on Liens*, §§ 52, 54, 57; *H. Ins. Co. v. Smith*, 28 Hun, 296; *Rooney v. S. A. R. R. Co.*, 18 N. Y. 368, 371.) It is settled that an agreement that an attorney shall be compensated out of a fund to be recovered creates a lien thereon. (*Williams v. Ingersol*, 23 Hun, 284; *Fairbanks v. Sargent*, 29 id. 588; 104 N. Y. 108; *Brown v. Mayor, etc.*, 11 Hun, 21; *Wylie v. Coze*, 15 How. [U. S.] 415.) The defendant is an equitable assignee of the award to the amount of \$871 agreed to be paid him. (*Overton on Liens*, § 62; *Coughlin v. N. Y. C. R. R. Co.*, 71 N. Y. 443, 449; *Wright v. Wright*, 70 id. 98; *Marshal v. Meech*, 41 id. 140, 143; *Rooney v. S. A. R. R.*

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Co., 18 id. 368.) Even if there had been no express agreement, equity would create a lien on the fund, because on general considerations of justice defendant should be compensated for what he had done. (13 Am. Ency. of Law [Liens], 610.) The lien will prevail not only against Denninger, but also against all persons, including plaintiff, who claim under him. (Meacham on Agency, § 864; *Schwartz v. Schwartz*, 21 Hun, 133; *Williams v. Crane*, 23 id. 284; *Ellis v. Horrmann*, 90 N. Y. 466.) The defendant being the equitable assignee of the award to the extent of his agreed compensation, prior in time to the transfer of the award to plaintiffs, will be protected though he had given no notice to the subsequent assignees, the plaintiffs. (*Fairbanks v. Sargent*, 104 N. Y. 108.) The purchaser at the foreclosure sale acquired no title to the land taken for Melrose avenue or the award made for said land, and the deed to plaintiffs conveyed no more than their grantor had — nothing. (Laws of 1882, chap. 410, § 990; *In re Eleventh Ave.*, 81 N. Y. 436; *H. Ins. Co. v. Smith*, 28 Hun, 296; 3 Pom. Eq. Juris. 135, § 1167; *Ballou v. Ballou*, 78 N. Y. 325; *King v. Mayor, etc.*, 102 id. 171, 175; *Aspinwall v. Balch*, 4 Abb. [N. C.] 193, 196; *Mitchell v. Bartlett*, 51 N. Y. 452; *Cheney v. Woodruff*, 45 id. 100; *M. L. Ins. Co. v. Balch*, 4 Abb. [N. C.] 200.)

ANDREWS, Ch. J. The mortgage to the Harlem Savings Bank was a paramount lien on the mortgaged property. The title of Denninger was subject to the mortgage, and any rights in the land which he might subsequently create would be subordinate to the mortgage. The power of sale upon default in the payment of the mortgage was an essential element of the mortgage security, and could not be taken away or impaired by any act or contract of the mortgagor. The lien of a mortgage attaches not only to the land in the condition in which it was at the execution of the mortgage, but to everything which becomes by annexation a part of the realty during the existence of the mortgage. Improvements made upon the land and buildings or structures erected

thereon by the owner are immediately covered by the lien of the mortgage as effectually as though they had existed when the mortgage was executed. The statute authorizes liens in favor of mechanics and materialmen who have furnished labor or materials in the erection of buildings under a contract with the owner of lands. But liens so acquired cannot displace the lien of a prior mortgage, although the mortgage security has been strengthened by the new erections, nor, indeed, even though they furnished the principal element of value which made the mortgage collectible. We refer, of course, to cases where the mortgagee was not a party to the transaction and had not consented to subordinate his lien to the claims of other creditors.

The agreement between Denninger and the defendant was made in November, 1888, more than a year after the mortgage had been made to the savings bank. The bank was not a party to the agreement, nor, so far as appears, did it have any notice of its existence until after the sale on the foreclosure of the bank mortgage on the 21st of April, 1892. When the agreement was made proceedings had been instituted by the city of New York to acquire title to part of the lands of Denninger covered by the mortgage, for the purpose of a street, under the right of eminent domain. The agreement was entered into by Denninger as owner of the lands and for his own benefit. He could not make any agreement binding upon the savings bank, or which would affect its rights under the mortgage. If the proceedings were prosecuted to a final consummation the city would acquire title to a part of the mortgaged premises required for the street. All pre-existing titles and interests would thereupon become extinguished and the award of the commissioners would stand as a substitute for the land taken. Where the lands taken are mortgaged, the mortgagee would be entitled to have the award applied upon his mortgage to the extent necessary for his protection, and the remainder would be payable to the owner of the land. The court upon application would adjust the rights of the several claimants of the award according to their legal and equitable interests.

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(*Astor v. Hoyt*, 5 Wend. 605; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Barnes v. Mayor*, 27 Hun, 236; 1 Jones on Mort. § 708.) The agreement of November 16, 1888, between Denninger and the defendant, was, on its face, a personal contract between the parties, upon which, so far as appears, an action may now be maintained by the defendant to recover the stipulated compensation. It may be conceded, also, that upon the making and confirmation of the award, the agreement operated as an equitable assignment to the defendant of any interest of Denninger therein, to the extent of the compensation agreed upon. But we perceive no principle whereby the claim of the defendant can be preferred as against the savings bank mortgage. If all the property covered by the mortgage had been taken by the city, the defendant could have made no claim on the award except upon any surplus remaining after payment of the mortgage debt. It may be true that the defendant, by his services, increased the award. But in rendering these services, he was acting under the employment of Denninger, and not as the agent or employee of the mortgagee. In law, the final award represented the actual value of the land, no more and no less, and the land was primarily pledged as security for the mortgage, and the priority of lien was transferred from the land to the award, and could not be subordinated to a lien subsequently created by Denninger in favor of the defendant, for services in the condemnation proceedings, however beneficial these services may have been either to Denninger or the mortgagee. So, also, a title to the award derived under the mortgage would be paramount to any lien or claim of the defendant under his agreement with Denninger. The right to enforce the mortgage by sale of the mortgaged premises, and to vest in the purchaser the land mortgaged, extinguishing thereby the title of the mortgagor, is, as we have said, one of the most important elements in a mortgage security. When the premises were bid off by Toch on the sale on the foreclosure judgment, April 21, 1891, there had been no confirmation of the report of the commissioners of estimate and appraisal. The confirmation did not

take place until May 1, 1891. The title of Denninger to the lands included in the street was not divested at the time of the sale. By the terms of the Consolidation Act, under which the street opening proceedings were taken, the title of the owner is not divested until the confirmation of the report of the commissioners. Indeed, until that event the proceedings may, in a certain contingency, be abandoned. (Consolidation Act of 1882, § 900; *Matter of 17th Street*, 1 Wend. 262; *Matter of 11th Avenue*, 81 N. Y. 436.) Toch, the purchaser on the foreclosure sale, became entitled to a conveyance from the referee on completing his purchase, and he received a deed May 25, 1891, purporting to convey the entire premises sold. This deed was in accordance with the sale, but intermediate the sale and the conveyance, and on May 1, 1891, the court had confirmed the report of the commissioners. Much was said on the argument upon the question whether the deed of May 25th took effect by relation as of the date of the sale. It does not seem to us that this is a material inquiry. The sale was in fact followed by a deed made in pursuance thereof. The purchaser, on completing his purchase, became entitled to a deed of the whole land embraced in the mortgage. If, on the day of the purchase, the deed had been executed, the subsequent award would unquestionably have belonged to the purchaser. The deed, when executed, operated, we think, to carry the award which, at that date, represented a part of the land purchased. It was a part of the mortgage contract that on default the mortgaged premises could be sold and the title transferred by a public judicial sale. The defendant's agreement was subject to this right. The deed, when executed, confirmed the sale previously made, and transferred the award to the purchaser free from any claim either of Denninger or the defendant. All parties interested in the land, or claiming liens thereon, could have protected their rights by seeing that the premises upon the sale brought their full value. So, also, if they had inadvertently omitted to protect their rights on the sale, or other circumstances had occurred after

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the sale which made it inequitable to complete it, they could have applied to the court for a re-sale or other equitable relief. We think, however meritorious the claim of the defendant may be, the sustaining of the judgment in this case would furnish a dangerous precedent, affecting the security of mortgages on land. The case of *Home Insurance Company v. Smith* (28 Hun, 296) arose between the plaintiff, who claimed under an assignment of an award in street opening proceedings from the purchaser on the foreclosure of a mortgage, which covered part of premises subsequently taken for a street, and the defendants, who claimed a lien on the award under an agreement similar to the one in this case, made with the owner of the mortgaged premises. The sale on the foreclosure was made after the report of the commissioners of assessment and estimate had been confirmed, and brought enough to satisfy the mortgage. It was held that the title of the owner to the part of the mortgaged premises taken for the street having been divested by the confirmation of the report prior to the sale on the foreclosure judgment, the sale operated only upon the remaining land, and that the part of the land for which the award was made was as "completely excluded by the proceedings from the mortgage as though it had never been incumbered by it," and that, consequently, the purchaser acquired no title in law or equity to the award and could transfer none. It was held that, under the circumstances, the award belonged to the owners of the land taken and was subject to the lien created by their agreement. This case has no analogy to the present one.

The judgment of the General and Special Terms should be reversed and the demurrer of the plaintiff to the answer sustained, with leave to the defendant to answer on payment of costs.

All concur.

Judgment accordingly.

HENRY W. GRAY, Respondent, v. GEORGE T. GREEN,
Appellant.

Where upon the dissolution of a partnership no special agreement is made as to liquidation, the partnership continues for that purpose; each of its members has an equal right with the others to the possession of the firm assets, and is under an equal duty to apply those assets to the discharge of the debts.

While each is so engaged, acting with reasonable diligence and without discord, equity may not intervene until a final settlement is possible, in which one party or the other refuses and neglects to join.

Until such refusal, therefore, by one of the co-partners, the Statute of Limitations does not begin to run against a cause of action for an accounting. Accordingly *held*, where, prior to the dissolution of a partnership by mutual consent, without any agreement for liquidation, one of the partners had, without right as between him and his co-partner, withdrawn a sum of money from the firm, and after the dissolution both acted faithfully in liquidation, upon the completion of which the partner who had made the over-draft refused to account, that the Statute of Limitations only then began to run against a cause of action in favor of his co-partner for an accounting, at least in the absence of a finding that the former had, prior to that time, refused to apply the over-draft to the purposes of the liquidation.

Gray v. Green (125 N. Y. 203), distinguished.
Reported below, 66 Hun, 469.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 16, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought for a dissolution of the firm of H. W. Gray & Co., stockbrokers, which was composed of the plaintiff and defendant. The complaint demanded that the partnership be adjudged dissolved, an accounting had and that plaintiff have judgment for a balance claimed to be due.

The facts, so far as material, are stated in the opinion.

Wheeler H. Peckham for appellant. On the conceded facts the Statute of Limitations of ten years had run. The

action was commenced August 5, 1884. (Code Civ. Pro. § 388.)

Whitehead & Suydam for appellant. The government claim, even if it were an asset of the co-partnership — which it is shown not to have been — differed in no respect from any other asset, in that it could have passed from the co-partnership by operation of law, that is to say, to a receiver appointed to wind up the affairs of the firm, even before the government had taken any steps to re-pay it. (*A. V. S. Co. v. B. M. Co.*, 127 U. S. 379; *F. S. & T. Co. v. Shepherd*, Id. 494; *Phelps v. McDonald*, 99 id. 305; *St. P. R. R. Co. v. United States*, 112 id. 737; *Taft v. Marsily*, 120 N. Y. 474.) This action is barred by the Statute of Limitations. (Code Civ. Pro. § 388; 2 Lindley on Part. 964.)

Elihu Root for respondent. No cause of action ever arose to the plaintiff to recover from the defendant the specific indebtedness charged against him, or for the recovery of any amount in advance of a winding up and an accounting. (*Belanger v. Dana*, 52 Hun, 39; *Arnold v. Arnold*, 90 N. Y. 580.) No cause of action arose to the plaintiff upon the dissolution, to have the partnership affairs wound up by judicial interference. (Bates on Part. §§ 909, 949, 995, 999; *Riddle v. Whitehill*, 135 U. S. 621; *Gray v. Green*, 125 N. Y. 203; Wood on Lim. § 210; Pars. on Part. [4th ed.] § 288; *Kennedy v. Porter*, 109 N. Y. 552; *Murray v. Mumford*, 6 Cow. 441.) A cause of action such as this for a settlement of accounts arising out of the friendly winding up of partnership affairs does not accrue, and the statute does not begin to run until the winding up is in fact accomplished, and the last transaction properly entering into the account is completed. (*McClung v. Capehart*, 24 Minn. 17; *Arnold v. Arnold*, 90 N. Y. 580; *Mussey v. Tingle*, 29 Mo. 437; *Tutt v. Cloney*, 62 id. 116; *Lawrence v. Rokes*, 61 Maine, 38; *Krutz v. Craig*, 53 Ind. 561; *Gleason v. White*, 34 Cal. 253; *Prentice v. Elliott*, 72 Ga. 154; *Patterson v. Lilly*, 90 N. C. 82; *Foster v. Rison*,

17 Gratt. 321; *Sandy v. Randall*, 20 W. Va. 244; *Brewer v. Brown*, 68 Ala. 210; *Wells v. Brown*, 83 id. 161; *Near v. Lowe*, 49 Mich. 482; *Arnett v. Finney*, 41 N. J. Eq. 147; *Preston v. Fitch*, 137 N. Y. 41; *Holmes v. Gilman*, 138 id. 369; *Riddle v. Whitehill*, 135 U. S. 621, 638; 2 Williams on Exrs. 1315, 1316.)

FINCH, J. When this case was before us on a previous appeal (125 N. Y. 203), we reversed the judgment and ordered a new trial, holding that upon the facts then disclosed the cause of action proved under the pleadings accrued at the date of the dissolution of the partnership. It then appeared that such dissolution was effected by mutual consent, and that the duty of liquidation had been assigned solely to the plaintiff, a fact about which there was no controversy and which stood both found and admitted. It further appeared that just before the dissolution the defendant had withdrawn from the assets, without right as between himself and his partner, the sum of about \$10,000, and that a restoration of that sum to the fund in the hands of the liquidator was necessary to enable him to perform his duty in the payment of partnership debts or to re-imburse his own means so already applied. We determined thereupon that the latter had the right to that relief before the end of the liquidation and whenever circumstances made it necessary; that he could reclaim it at once when the defendant denied his duty to restore it, and insisted upon holding it by force of an alleged settlement made at the date of the dissolution; that the liquidating partner was not bound to wait till the close of the liquidation, but might sue at once to solve the disputed right, even though an accounting might be essential to the result. Looking back upon that conclusion in the light of such criticism as it has received, and seeking to appreciate its just force, I am still satisfied that our determination was correct upon the situation as we then understood it, and upon the facts which appeared upon the record.

But a very great change has come over those facts, so

great that I have examined again the earlier record to see whether I may not have misunderstood or misinterpreted them. That examination shows that the court explicitly found as a fact the appointment of the plaintiff as "the liquidating partner of the partnership," and the defendant's answer denies liability for any overdraft, and alleges a settlement made at the date of the dissolution. But now the vital and fundamental fact upon which our previous opinion stood, which was the appointment and authority of the plaintiff as the exclusive agent for winding up the partnership affairs, has wholly disappeared, and with it has gone the further fact that there was disagreement between the parties immediately upon the dissolution and an antagonism of claims, for now it is found that Gray was not made liquidator, that both parties acted as such, that both have acted faithfully, and that defendant has recognized that there was no settlement at the date of the dissolution by joining in the liquidation and asking credit in its results. How this remarkable and fundamental change in the facts occurred has been the subject of discussion on the argument. The defendant maintains that the evidence has not changed, but only the judgment of the trial court upon it; that the finding on the first trial was right and on this one is wrong, and that the change had its origin in an effort to evade the judgment of this court. I do not deem that criticism just. Looking over the evidence I feel bound to say that there is reasonable explanation of the change, and much in the conduct of the parties which is in accord with the later finding, and that at all events it has such support in the proof as to put it beyond our review, and compel us to accept it as the truth.

It follows that we can no longer treat the action as one by the chosen liquidator, whose right to all the assets has been denied, to re-claim such assets needed for the liquidation, and must regard it simply and wholly as an action by one partner after a dissolution to compel an accounting and adjustment of the partnership affairs. The complaint readily admits of that construction, and since the present findings disclose no other

cause of action we must treat it as one for a final accounting. We cannot now say that the cause of action established was one which arose at or near the date of the dissolution. The fact which caused its origin at that date has been eliminated, and in its room no other fact requiring or justifying the intervention of equity is to be found until a much later period.

In *Ham v. Gilmore*, (142 N. Y. 1), we had occasion to express concurrence in the doctrine of the Federal court that where a liquidation is proceeding with due diligence, without antagonism between the parties, or cause for judicial interference, the right of action for an accounting and payment over of shares arises when the liquidation is or ought to be complete, because until then there can be no adequate ground of complaint. That is more obviously true where both parties are, as upon the findings they were here, authorized to wind up the affairs. Where no special agreement as to the liquidation is made the partnership, although dissolved, continues for that purpose, and each of its members has an equal right to the possession of its assets, and are under an equal duty to apply those assets to the discharge of the debts. (*Robbins v. Fuller*, 24 N. Y. 570.) While each is so engaged, acting with reasonable diligence and without discord, there is nothing to complain of and no occasion for the intervention of equity until a final settlement is possible in which one party or the other refuses or neglects to join. Before that each may collect debts due, and if one is slow the other may be swift. Each may pay off liabilities until assets are exhausted, and neither can complain of the other until some emergency arises in which a right is denied or violated, or unduly delayed. The findings in the present case show a joint and amicable action down to a brief period before the commencement of the suit. An accurate and complete adjustment was delayed, without the fault of either party, by the impossibility of at least three collections; and it was not until they were accomplished that the ultimate result could be known. While there was in the hands of defendant Green the amount of his overdraft made before the dissolution, he could apply it to the purposes of the liquida-

tion and pay out of it liabilities of the firm. There is no finding or request to find that he refused to do so until his refusal to account. Gray could not disturb his possession until at least the fund was needed as an asset and Green refused to properly use and apply it. Upon the findings now made, it is impossible to hold, as we did upon the very different findings of the former trial, that the plaintiff's cause of action is barred by the Statute of Limitations. I think he has so changed the facts as to make our previous conclusion inapplicable. In all these actions between partners, the application of the statute necessarily depends upon the circumstances of each particular case. The cause of action may arise, as in *Brush v. Jay* (113 N. Y. 482), before the dissolution, and have that for its primary object: it may arise, at or near the dissolution, when one is made exclusive liquidator and his right to the possession of assets is denied and resisted (*Gray v. Green*, 125 N. Y. 203): it may arise when a non-liquidating partner sues the liquidator within a reasonable time after the dissolution, as in *Ham v. Gilmore* (142 N. Y. 1): or where, as here, both parties act as liquidators with equal rights and duties, and neither is guilty of any wrong in the process, the cause of action may arise later, and necessarily will not exist until the liquidation is substantially complete. These are recent instances, but do not at all cover the varieties of form and incident which these actions may develop, so that always the running of the statute cannot be governed by any rigid or formal rule, but must depend upon circumstances. Those circumstances have in this case been so changed by the findings as to make it our duty to hold that the Statute of Limitations did not operate to bar and defeat the action.

The judgment should be affirmed, with costs.

All concur, except PECKHAM, J., not voting.

Judgment affirmed.

JOSEPH BENJAMIN DIMMICK, as Trustee, etc., Respondent, v.
C. GODFREY PATTERSON, Impleaded, etc., Appellant.

B. died, leaving a widow and two children, a son and a daughter, him surviving. By his will he directed his residuary estate to be divided into three parts. He gave the rents, issues and profits of one part to his wife, of one to his daughter during life, and of the other part to the son until he should reach the age of thirty years, when one-half of said part was given to him absolutely, the other half when he attained the age of forty. In case of the death of the son before his third became vested in him, either in part or wholly, the portion that had not vested was given to his children, if any survived him. The will directed that at the death of the widow the part appropriated to the use of the widow should be divided and one-half thereof added to the daughter's part, the other half to that of the son, each "to be governed and affected in every respect" by the provisions of the will touching the parts of the children respectively "as fully and particularly as if such additions had originally constituted portions of said parts." The son died after reaching the age of forty, leaving children. Thereafter the widow died. In an action for the construction of the will, *held*, it was the clear intention of the testator that the son should become vested with one-half of all he was to take under the will at the age of thirty, and with the other half at forty, subject, however, to the life estate of the widow in the one-third set apart for her, and so that an assignment by the son of his interest carried with it one-half of that third.

Dimmick v. Patterson (86 Hun, 492), reversed.

(Submitted April 18, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought for a construction of the will of Joseph Benjamin, deceased.

The facts and portions of the will, so far as material, are stated in the opinion.

Henry Major for appellant. In the construction of wills the cardinal rule is that the intention of the testator, as

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expressed in the instrument, shall govern. (*Goebel v. Wolf*, 113 N. Y. 405; *Taggart v. Murray*, 53 id. 236; *In re Tienken*, 131 id. 391; *Bowditch v. Ayrault*, 138 id. 222.) It was the testator's intention in this case that one-half of the principal of the widow's share should, subject to the provision for her support, vest in his son Joseph R., like the gift to him in the third clause, one-half upon his arriving at thirty, and the other half upon his arriving at forty years of age. It was likewise his intention that such vesting should take place without regard to whether the son survived his mother or not. (*Goebel v. Wolf*, 113 N. Y. 405; *In re Tienken*, 131 id. 391.) The decision of the learned General Term that Joseph R. Benjamin, the son, did not acquire a vested interest as claimed, because he died before his mother, leads to intestacy on the part of the testator as to the one-half of the widow's share under consideration. (*Manice v. Manice*, 43 N. Y. 368; *Findlay v. Bent*, 95 id. 365; *Vernon v. Vernon*, 53 id. 351-361; *Schult v. Moll*, 132 id. 127; *Byrnes v. Stillwell*, 103 id. 453-460.)

James R. Ely for respondent. It was clearly testator's intention to tie up his estate for as long a period as the law would allow and to prevent the wasting of the same by the sale of an expectancy therein for an insufficient consideration before the sums therein bequeathed were payable. (*Mead v. Maben*, 131 N. Y. 255; *Bowditch v. Ayrault*, 138 id. 222.) There being no direct words of gift, but merely a direction to divide and add, the fund held in a trust for Martha M. Benjamin, testator's widow, did not vest until her death. (*Warner v. Durant*, 76 N. Y. 136; *Smith v. Edwards*, 88 id. 92; *Delancy v. McCormack*, Id. 174; *Shipman v. Rollins*, 98 id. 311; *Goebel v. Wolf*, 113 id. 405; *Tillman v. Sullivan*, 63 How. Pr. 355; *Lougheed v. D. B. Church*, 129 N. Y. 211; *Mead v. Maben*, 131 id. 255; *Bowditch v. Ayrault*, 138 id. 222.) The same result follows if this fund is considered as real estate. In that case the interests of all persons who were to share in the remainder were purely contingent. (1 R. S.

729, § 58; *Townshend v. Frommer*, 125 N. Y. 446; *Manice v. Manice*, 43 id. 289; *U. S. T. Co. v. Roche*, 116 id. 120.)

Joseph O. Brown for respondent. The fund in question did not vest until the death of the widow, Martha M. Benjamin, when it vested in the children of Joseph Benjamin, the younger, the son of testator. (*Everett v. Everett*, 29 N. Y. 67; *Smith v. Edwards*, 88 id. 92; *Sherman v. Rollins*, 98 id. 311; *Teed v. Morton*, 60 id. 502; *Vincent v. Newhouse*, 83 id. 505; *Howland v. Howland*, 9 N. Y. Supp. 233; *Tillman v. Sullivan*, 63 How. Pr. 355.)

EARL, J. Joseph Benjamin died on the 25th day of May, 1872, leaving a widow and two children, Mrs. Dimmick and Joseph R. Benjamin, and leaving a will in which, after some trifling bequests, he disposed of the residue of his estate in the third and fourth clauses thereof as follows :

“ *Third.* All the rest and residue of my estate, real and personal, and wheresoever situate, I direct shall be divided by my said executors into three equal parts as nearly as can be ; and to my said wife, during her natural life, I give, bequeath and devise the rents, issues, profits and income of one of the said parts ; and to my said daughter, during her natural life, I give, bequeath and devise the rents, issues, profits and income of one of the said parts ; and at the death of my said daughter I give, bequeath and devise the said last-mentioned part to her heirs and assigns forever ; and to my said son, until he shall attain the age of thirty years, I give, bequeath and devise the rents, issues, profits and income of the remaining one of said parts ; and upon his attaining said age of thirty years, I give, bequeath and devise unto him, and to his heirs and assigns forever, the equal one-half of said part, and the rents, issues, profits and income of the other one-half of said part unto my said son until he shall attain the age of forty years ; and upon his attaining said last-mentioned age, I give, bequeath and devise the residue of said part unto him and to his heirs and assigns forever. In case,

however, of his death before the said part shall vest by the foregoing provisions in him, either in part or wholly, then I give, bequeath and devise said part or such portion thereof as may not then have vested in my said son, as aforesaid, unto his children, if he shall leave any him surviving, and to their heirs and assigns forever; but if he shall not leave any children him surviving, and shall leave a widow him surviving, then I give, bequeath and devise unto such widow and to her heirs and assigns forever, the equal one-third of said part; and the rents, issues, profits and income of the residue thereof, not as aforesaid vested in my said son, I give, bequeath and devise unto my said daughter, during her natural life, and at her death the said residue itself unto the heirs of my said daughter and to their heirs and assigns forever; and if he die without leaving such widow or a child or children him surviving, then I give, bequeath and devise the rents, issues, profits and income of so much of said part as shall not as aforesaid have vested in him unto my said daughter during her natural life, and at her death said part or portion thereof itself unto her heirs and to their heirs and assigns forever.

“*Fourth.* At the death of my said wife, I direct that the said part appropriated, as aforesaid, to her use, shall be equally divided, and the one-half thereof be added to the said part appropriated, as aforesaid, to the use of my said daughter, and the other half thereof be added to the said part appropriated, as aforesaid, to the use of my said son, and each be governed and affected in every respect by the provisions of this my will, touching the said last two mentioned parts respectively, as fully and particularly as if such additions had originally constituted portions of said parts.”

The widow died April 21st, 1891. Joseph R. Benjamin died in October, 1885, leaving three children, who are parties to this action. At the time of his death he was indebted to the defendant, C. Godfrey Patterson, in the sum of \$1,873.85, with interest thereon from July 21st, 1884, for which at that date he gave his promissory note, and at the same time, for the purpose of securing the payment of the note, he executed

a written assignment to Patterson, under his hand and seal, by which he transferred to him so much of the estate belonging to and vesting in him under and by virtue of the provisions of his father's will, as should be sufficient and necessary to pay the principal of the note, together with the interest thereon, up to the time of the payment.

This is an action for the construction of the will, and there is now involved only the right or estate which Joseph R. Benjamin took under the fourth clause of the will. The courts below have held that as he died before his mother he took no vested interest whatever in the one-third which had been set apart for her, and that the one-half of that share upon her death passed to his children, and that Patterson took no interest therein by virtue of the assignment executed to him in 1884; and Patterson is now the only appellant from the judgment below.

The reasoning of the court below is, briefly, that there was no direct gift to Joseph R. Benjamin in the fourth clause, and that, therefore, the rule was to be applied that where the only gift is found in the direction to divide at a future time, the gift is future and contingent, and the estate does not vest until the time for division arrives.

Joseph R. Benjamin was upwards of forty years old at the time of his death, and at the time of the execution of the assignment by him to Patterson. Therefore, he had clearly become vested with the one-third of his father's estate, given to him in the third clause of the will. It was there expressly provided that one-half of that third should vest in him at the age of thirty, and the other half at the age of forty, and those shares could not vest earlier. As to them, his interests were contingent until the respective periods were reached, when they became absolutely vested in him. In the fourth clause there is not simply a direction to divide, but it is expressly provided that the share there given to each of his children should be governed and affected in every respect by the provisions contained in the fourth clause "as fully and particularly as if such additions had originally constituted portions

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of said part." The provisions of the third clause, so far as they can be made applicable, must be read as if they were incorporated in the fourth clause, and hence there is a gift of one-half of Joseph R. Benjamin's interest under the fourth clause to vest in him on his arrival at thirty, and the other half to vest in him on his arrival at the age of forty, both shares, however, being subject to his mother's life estate. We think, reading these two clauses together, it was the clear intention of the testator that the son should become vested with the one-half of all he was to take under the will at the age of thirty, and with the other half at the age of forty, subject, however, to the life estate of his mother in the one-third.

It, therefore, follows that the assignment of Joseph R. Benjamin to Patterson became operative and effectual, as now claimed by him.

The judgment must, therefore, be reversed, so far as appealed from, and the case remitted to the Special Term for judgment in accordance with this opinion, the costs of the appellant in all the courts to be paid out of the fund in controversy.

All concur.

Judgment accordingly.

FREDERICK P. FORSTER et al., Respondents, v. RICHARD M. WINFIELD, Appellant.

Before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifest.

The will of F. empowered his executors, two in number, to sell any of the real estate of which he died seized, and out of the proceeds "which they are to receive as trustees and in trust to pay any debts;" the net residue after payment of all debts he gave to the "executors and the survivor of them as joint tenants." Then followed this clause: "I have entire confidence that they will make such disposition of such residue as under the circumstances, were I alive and to be consulted, they know would meet my approval." But one of the executors qualified; they both as individuals contracted to sell to defendant a portion of the lands of which the testator died seized. *Held*, that plaintiffs did not take title to the real estate as individuals, and as such could not convey title;

and so, that defendant was entitled to judgment for a return of the deposit made by him on execution of the contract and a cancellation of the contract.

(Submitted April 20, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 1, 1893, which directed judgment in favor of plaintiffs upon a case submitted under section 1279 of the Code of Civil Procedure.

George H. Forster died in the city of New York in November, 1888, leaving a widow and two sons, Henry A. Forster and Frederick E. Forster, and also leaving a will, the sixth clause of which is as follows:

"*Sixth.* I appoint my brother, Frederick P. Forster, and my son, Henry A. Forster, executors of this will, and empower them to sell and convey all and any part of any real estate of which I may die seized or possessed, to compound, compromise, submit to arbitration and settle all claims against my estate, also all claims belonging to my estate, on such terms as they or the survivor, or the one who may qualify, shall see fit. It is my will that, in case it is necessary to prove this will in Massachusetts, or in any other state, where security is required from executors, that no bond or security shall be required from either of them for administration on my estate.

"I direct my executors, out of the proceeds realized by them under the power of sale hereinbefore conferred, which they are to receive as trustees and in trust, to pay any debts that I may owe, including any mortgages to secure bonds heretofore given by me, whether such real estate has been conveyed to any member of my family or shall belong to me at the time of my decease; and the net residue, after payment of all such debts, I give to my said executors and to the survivor of them as joint tenants. I have entire confidence that they will make such disposition of such residue as, under the circumstances, were I alive and to be consulted, they know would meet my approval."

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Frederick P. Forster took letters testamentary on the will, but the other executor never qualified as such. The property of the testator at the time of his death consisted chiefly of vacant, unimproved and unproductive real estate, all of which was mortgaged; and he left less than \$1,000 worth of personal property. At the time of making his will, and at his death, his real estate was worth less than \$104,000, and at the time of his death his debts were in excess of \$91,500, besides mortgages on the real estate on which there was due upwards of \$33,000.

Frederick P. Forster, one of the executors, had been in partnership with the testator for many years, and the other executor was his eldest son. On the 19th day of November, 1892, these plaintiffs individually entered into a written agreement with the defendant to convey to him a lot of land described as "Lot No. 287 on a map of 339 lots at Riverdale and Mosholu, property of F. P. and H. A. Forster, for the price or consideration of \$550,000;" and they agreed to give a good title in fee simple, free from all incumbrances, with full covenants and warranty. The plaintiffs tendered a deed executed by them as individuals, proper in form to convey the lot, which the defendant declined, claiming that they were not able to convey the lot to him by a good title in fee simple.

The only title claimed by the plaintiffs is under the will. The facts were agreed upon as hereinbefore recited in a written submission to the General Term, which also stated that plaintiff claimed judgment for a specific performance of the contract on the ground that the will of George H. Forster contains a gift to them as individuals of the proceeds of the sale of the whole of testator's real estate, after the payment of debts and mortgages; that they have a right to elect between the proceeds of the sale of the testator's real estate and the land itself, and that as they have elected to take the lot in question, instead of the proceeds of the sale thereof, they are seized of the lot in question and are entitled to convey it to the defendant in fee simple absolute.

The defendant claims judgment for the return of his deposit upon the ground : (1) That the gift to the executors was not for their individual benefit, but to them as trustees on a trust which is void because there is no beneficiary or object of the trust designated, and the plaintiffs took nothing thereunder ; (2) that the gift to the plaintiffs was not of the net proceeds of the sale of all of the testator's real estate after the payment of debts and mortgages, but was only of the net proceeds, if any, of so much real estate as was necessarily sold to pay debts and mortgages over and above the amount of the debts and mortgages, and that all of the real estate not necessarily disposed of to pay debts and mortgages was undisposed of by the will and passed to the testator's children by inheritance.

Upon these facts the questions submitted to the court are :

"1. Is the gift of the net proceeds of the testator's real estate after the payment of debts and mortgages an absolute gift to the plaintiffs as individuals ?

2. Is the gift of the net proceeds of the sale of the testator's real estate a gift of the net proceeds of the sale of the whole of the testator's real estate after paying debts and mortgages, or only a gift of the net proceeds, if any, of only such real estate as is necessarily sold to pay debts and mortgages over the amount of such debts and mortgages ?

3. Are the plaintiffs entitled to collect the five hundred dollars from the defendant upon tendering him a short-form full-covenant warranty deed of the lot described in the agreed case, or is the defendant entitled to the return of the deposit of fifty dollars and the cancellation of his contract to purchase the lot in question ?"

Upon the facts submitted the General Term determined that the plaintiffs took title to the real estate as individuals, and that they were, therefore, able as such to perform their contract with the defendant and to give a good title, and it rendered judgment in favor of the plaintiffs for the specific performance of the contract.

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Edward E. Sprague for appellant. The court will reject, if possible, the plaintiffs' construction of the will, because it effects the disinheritance of the testator's children. (*Low v. Harmony*, 72 N. Y. 414; *Wood v. Mitcham*, 92 id. 375; *Matter of Brown*, 93 id. 295; Williams on Executors [7th ed.], 1281; *In re Appleton*, L. R. [29 Ch. Div.] 893; *Slavey v. Watney*, L. R. [2 Eq.] 418.) The gift is not to the executors beneficially, but in trust. (1 Perry on Trusts, § 114; *Shovelton v. Shovelton*, 32 Beav. 143; *Palmer v. Simmonds*, 2 Drew, 221; *Warner v. Butes*, 98 Mass. 274; *Briggs v. Penny*, 3 McN. & G. 546; *Raikes v. Ward*, 1 Hare, 445; *Ware v. Mallard*, 16 Jur. 492; *Foose v. Whitmore*, 82 N. Y. 407.) The will does not purport to make any disposition of that part of the realty not sold for payment of debts. (*Allen v. De Witt*, 3 N. Y. 276; *Hetril v. Barber*, 69 id. 1; *McCarty v. Deming*, 4 Lans. 440; *Jackson v. Jansen*, 6 Johns. 73; *Sharpsteen v. Tillou*, 3 Cow. 651.) The questions presented are at best too doubtful to be determined against the defendant by an adjudication which will not bind the heirs. (*Abbott v. James*, 111 N. Y. 673; *Fleming v. Burnham*, 100 id. 8; *Jordan v. Poillon*, 77 id. 518; *Kilpatrick v. Barron*, 125 id. 751.)

Foster & Speir for respondents. The gift of the net proceeds of the sale of all of the testator's real estate after the payment of debts, was an absolute gift to the plaintiffs as individuals, and not on any trust. (*Lawrence v. Cooke*, 104 N. Y. 632, 636-639; *Foose v. Whitmore*, 82 id. 405, 407, 408; *Field v. Mayor*, 38 Hun, 590; 105 N. Y. 623; *In re Kelman*, 126 id. 73, 80, 81; *Howorth v. Dewell*, 29 Beav. 18-20; *Reid v. Atkinson*, 5 Irish Rep. Eq. 373, 378, 380, 381; *Meredith v. Heneage*, 1 Sim. 542, 565, 566; *Stead v. Mellor*, L. R. [5 Ch. Div.] 225, 228; *Lambe v. Eames*, L. R. [6 Ch. App.] 597; *Winch v. Brutton*, 14 Sim. 379; *Curtis v. Rippon*, 5 Madd. 434; *Clarke v. Leupp*, 88 N. Y. 228, 230-234; *Roseboom v. Roseboom*, 81 N. Y. 356-359; *Campbell v. Beaumont*, 91 id. 464, 468; *Parsons v. Best*, 1 T. & C. 211;

Mackett v. Mackett, 14 Eq. Cas. 49, 53; *Knight v. Boughton*, 11 Cl. & Fin. 513, 553, 554, 548, 549, 551; *Greene v. Greene*, 3 Irish Rep. Eq. 629; *Reeves v. Baker*, 18 Beav. 372, 380, 381; *In re Hutchinson*, L. R. [8 Ch. Div.] 540, 542, 543; *Fox v. Fox*, 27 Beav. 301, 302; *Gibbs v. Rumsey*, 2 Ves. & Beames, 294; *Bardswell v. Bardswell*, 9 Sim. 319; *Sale v. Moore*, 1 id. 534.) The gift to the plaintiffs was of the net proceeds of the sale of the whole of the testator's real estate after the payment of debts and mortgages. (*Cussack v. Tweedy*, 126 N. Y. 81; *Schult v. Moll*, 132 id. 122, 127; *Vernon v. Vernon*, 53 id. 351, 361; *Delehanty v. St. Vincent*, 56 Hun, 55, 58; *Thomas v. Snyder*, 43 id. 14, 15; *Lyman v. Lyman*, 22 id. 261, 263.) The plaintiffs, being entitled to the net proceeds of the sale of the whole of the testator's real estate, have elected to take the lot in question instead of its proceeds. (*Greenland v. Waddell*, 116 N. Y. 234, 246; *Sayles v. Best*, 140 id. 376, 377; *Mellen v. Mellen*, 139 id. 210, 220, 221; *Kilpatrick v. Barron*, 125 id. 751, 752; *Armstrong v. McKelvey*, 104 id. 179, 183, 184; *Prentice v. Janssen*, 79 id. 478, 485, 486; *Garvey v. McDevitt*, 72 id. 563, 564; *Hetzel v. Barber*, 69 id. 11.) The defendant's objections to the title are without foundation. (2 Williams on Executors [6th Am. ed.], 1282-1284; *Compton v. Bloxham*, 2 Collyer, 201, 203; *Dix v. Reed*, 1 Sim. & Stu. 237; *In re Denby*, 3 De G., F. & J. 350; *Burgess v. Burgess*, 1 Collyer, 367; *Bubb v. Yelverton*, 13 Eq. Cas. 131; *Wildes v. Davies*, 1 S. & G. 475, 485; *Nelson v. Russell*, 135 N. Y. 137; *Forster v. Scott*, 136 id. 577; *Rochester v. Quintard*, Id. 221; *Adams v. E. R. S. Inst.*, Id. 52; *Spencer v. Merchant*, 100 id. 585; 125 U. S. 345.)

EARL, J. There is no technical rule of law to be applied in the construction of the 6th clause of this will. The intention of the testator, as that can be ascertained from the language used, is to control and have effect. Did the testator intend to vest Frederick P. Forster and Henry A. Forster, these plaintiffs, as individuals, absolutely with the title to the land or its proceeds? Before a gift to executors *eo nomine* can be held

to vest in them individually the intention that it should so vest must be plainly manifested. In the language here used we find no such intention. He appoints the plaintiffs executors of his will and gives them a power of sale. Then he directs them out of the proceeds realized by them from the execution of the power of sale, which they are to receive as trustees and in trust, to pay any debts that he might owe, including mortgages, and then he gives the entire residue, after payment of such debts, to his executors and to the survivor of them as joint tenants. If there were no more in this clause of the will it would scarcely be claimed that the testator had manifested any intention to vest the executors individually with the title to the land or its proceeds. All the language used relates to them as executors, and to them only in their official capacity. The gift is to them as joint tenants, and to the survivor of them, thus showing clearly that he was dealing with them in their official capacity.

The last part of this clause does not qualify what precedes it. There he says: "I have entire confidence that they will make such disposition of such residue, as, under the circumstances, were I alive and to be consulted, they know would meet my approval." This language does not necessarily imply that they were to take the land or its proceeds as individuals. It was just as appropriate in its relation to them as executors. He gives the real estate or its proceeds to them upon some undefined trust, a confidence not disclosed. The testator evidently supposed that the secret trust would be carried out, and possibly that it could legally be enforced. While it is quite true that this trust is unauthorized, that no estate can, under this gift, upon this undefined and void trust, vest in the executors as trustees, and that they take a mere power of sale for the purposes specified in the will, yet these circumstances do not authorize us to hold that language which would otherwise be construed as a gift to them as executors, should be construed as a gift to them as individuals. It is sufficient to refer for the general rule of construction of such a clause in a will, to 1 Perry on Trusts, sec. 158, and Lewin

on Trusts, page 149 and cases there cited. We find no authority which sustains a different construction.

Our conclusion, therefore, is that under this will the plaintiffs did not take title to this real estate as individuals, and that as such they cannot convey any title to the land in question to the defendant, and that, therefore, the defendant is entitled to a return of the deposit and a cancellation of his contract of purchase.

The judgment of the General Term should, therefore, be reversed, and judgment given for the defendant in accordance with this opinion. with costs in the Supreme Court and in this court.

All concur.

Judgment accordingly.

JOHN H. MING et al., Respondents, v. AUSTIN CORBIN,
Appellant.

Where an appeal is based simply upon an exception to a denial of a motion, made at the close of all the evidence on trial, for a direction of a verdict in favor of the appellant, it cannot be sustained unless it appears not only that there were no controverted questions of fact, simply questions of law for the court, but also that the jury did not correctly determine those questions.

If a question of law has been erroneously submitted to the jury, and decided as it should have been by the court, no one is prejudiced by the error, and so, there is no ground for appeal.

A contract for the sale of several distinct and separate items of property is entire where the promise by the purchaser is made conditional upon entire performance by the vendor.

In the absence of such a condition and where the price to be paid is apportioned to each item or is left to be implied by law, the contract is severable, and when the purchaser has received and accepted one of the items, it is no defense to an action to recover the purchase price that the other items have not been delivered; he is simply entitled to his damages, if any, because of the non-delivery.

Reported below, 68 Hun, 161.

(Argued April 18, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

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made March 17, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover a balance claimed to be due on a sale of certain bonds by plaintiffs to defendant.

The facts, so far as material, are stated in the opinion.

William J. Kelly for appellant. The contract of purchase was entire. Defendant purchased the two classes of securities, and before plaintiffs can recover they must show performance of the contract on their part. (*Kein v. Tupper*, 52 N. Y. 550; *Appleby v. Myers*, L. R. [2 C. P.] 3651; *Butler v. Butler*, 77 N. Y. 472; *Blanch v. Cocheran*, 8 Bing. 14; *Champlin v. Rowley*, 18 Wend. 187; *King v. Leighton*, 100 N. Y. 386; *Houck v. Muller*, L. R. [7 Q. B. Div.] 92.) There was no question of fact for the jury on the evidence in this case. (*Somer v. Meeker*, 25 N. Y. 361; *Fish v. Davis*, 62 Barb. 122; *Vassar v. Camp*, 11 N. Y. 441; *Treva v. Wood*, 36 id. 307.)

Charles A. Morgan for respondent. The motion of the defendant at the close of plaintiffs' case to dismiss the complaint, and his motion upon the whole case that the court direct a verdict for defendant, and that the complaint be dismissed, were properly denied; and the submission by the court of the whole case to the jury, in view of the verdict rendered, was not error for which the judgment will be reversed. (*O'Neil v. James*, 43 N. Y. 84; *Thompson v. Roberts*, 65 U. S. 233; *Vanderbilt v. E. I. Works*, 25 Wend. 665; *Tipton v. Feitner*, 20 N. Y. 423; *Avery v. Wilson*, 81 id. 341.)

O'BRIEN, J. This action, commenced in 1878, is founded upon a business transaction between the parties in 1872. The litigation has been in progress ever since with varying results at the Circuit and the General Term, and this appeal requires us to review a judgment in favor of the plaintiffs recovered on the third trial. The general contention of each party upon

the argument in this court is simple enough, but it involves the consideration of numerous facts and some questions of law, or, perhaps, mixed questions of law and fact, not entirely free from difficulty. The verdict for the plaintiffs was for a balance of the purchase price of certain bonds sold and delivered to the defendant by the plaintiffs. The contention of the learned counsel for the defendant is that the judgment is erroneous for the reason that upon the undisputed facts the bonds were delivered pursuant to a contract, entire in its nature and legal effect, whereby the plaintiffs sold them to defendant with other securities which were never delivered. That the plaintiffs before they can be permitted to recover must show performance on their part of all the provisions of this entire contract. The only way that the defendant has raised any question of law is by a single exception to the denial of his motion for the direction of a verdict in his favor at the close of all the testimony. In this condition of the record the appeal cannot be sustained unless it appears that there were no controverted questions of fact for the jury, but simply questions of law for the court, and that the jury did not correctly determine the questions of law erroneously submitted to them by the court. If the case involved purely a question of law and nothing else, and if that question has been well decided, the judgment is not erroneous because the decision was by the jury and not the court. It is the duty of the court to decide the questions of law arising in the case, but if a question of law has been erroneously submitted to the jury, and decided as it should have been by the court, no one has been prejudiced by the error.

In order to get a clear view of the case it is necessary to refer to the facts with some detail. The plaintiffs were residents of Helena, in the territory of Montana, and engaged in buying and selling securities there. The defendant was a banker and broker in New York. In March, 1872, one Sherwood, of Montana, being about to visit New York, had some conversation with the plaintiffs' firm in regard to placing some of their securities. This led to a letter from him, written from

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the defendant's office in New York under date of March 6, 1872, in which he informed the plaintiffs that he could place for them \$5,000 county bonds and same amount territorial scrip at 85. Neither the county bonds nor the scrip were otherwise described, but the letter was written evidently after a conversation between Sherwood and the defendant. On receipt of this letter the plaintiffs telegraphed Sherwood on the 19th of March in defendant's care as follows: "Will sell five each bonds and territorial warrants, at eighty-five for face and interest, and give you two hundred. If wanted, telegraph." This was the first step on the part of the plaintiffs in making any contract with the defendant, and it will be seen that the particular bonds, or the character of the warrants, or the rate of interest payable, was not specified, but Sherwood testifies that his conversation with defendant related to bonds of the county of Lewis & Clark and convertible territorial warrants. The next day the defendant in Sherwood's name telegraphed the plaintiffs as follows: "Send them; draw on me." Subsequently, on the same day, defendant sent the following telegram, also in Sherwood's name: "Send bonds, cannot use warrants unless to be bonded in June." The proof is that the plaintiffs intended to fill the order with warrants they then had on hand, some of which were fundable in June and some not, but on receipt of the telegram they regarded that part of the order relating to the territorial warrants as withdrawn or at least suspended for the time, and that part relating to the bonds as required to be immediately filled. The plaintiffs' position in respect to the warrants appears from the following letter written by them on the 20th of March, and addressed to Sherwood:

"Your two telegrams of the 20th are at hand. We will ship \$5,000 in bonds to-morrow night as we were unable to get them ready for to-night's coach. All territorial warrants issued prior to Dec. 1st, 1871 (under which head ours come), are to be bonded in June at 12 per cent interest, but from the tenor of your second dispatch we think you understand this fact, and are not certain whether ours are of the description

or not. But as we are not certain about it, we will not ship till we hear further from you. As a matter of course we cannot allow you more than \$100 for sale of bonds alone. In case you want the warrants you must let us know. The bonds will reach you the day after this letter comes to hand.

“Very truly yours,

“J. H. MING & CO.”

On the next day, March 21, the plaintiffs shipped the county bonds to the defendant of the face value of \$5,300. Nothing more was heard from the defendant in regard to the warrants until April 9, when the defendant telegraphed the plaintiffs to “send the five thousand territorial warrants,” but in the meantime, and on March 26, the plaintiffs sold them to another party at eighty-five for face and interest, the same price for which they were to sell them to the defendant, and no warrants were ever delivered to the defendant. Now, it may be that there was a contract entire in its nature for the delivery of the bonds and warrants without any specification as to their precise character or the interest which they drew, but the defendant was not quite satisfied with the contract in that form. His subsequent telegrams and letters were in such terms as to warrant the jury in finding that they left the plaintiffs in doubt whether he required the delivery of the warrants or not. He certainly did not want them unless they were of a certain kind not specifically mentioned in the plaintiffs’ written offer to sell. It appears that there was then in the market two classes of warrants, one class convertible into bonds in June and the other payable by the treasurer in cash at some future time. The plaintiffs evidently acted in good faith in selling the warrants on hand to another party, as they got no more for them than the price which, in the end, it turned out that the defendant was willing to pay. The true situation was revealed to the plaintiffs more clearly by a letter addressed to them by the defendant under date of April 13. In this the defendant informed them that he had about six weeks before purchased the bonds and warrants from Sherwood. That he understood

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the bonds drew fifteen per cent interest instead of twelve, and was astonished to find on their arrival that they drew but twelve. That his first impression was to hold them subject to their order, but on reflection concluded to place them at best rates without loss, hold funds subject to their order, and trust them to make the thing satisfactory when the situation was understood. That acting upon that he had sold the bonds and placed to their credit \$4,400, subject to their check, and had directed his cashier to send them a check book. There was then some discussion in the letter in regard to interest on the bonds accruing before they arrived in New York, which is not material. The defendant then proceeded to say that, "As to the adjustment of this matter generally, as to the misunderstanding, I shall leave it pretty much to you." That the bonds were worth \$350 less than he expected, and that no one was to blame for the misunderstanding. That he was willing to do his part to harmonize, so that no one would lose much and all be content. He then offered to deduct from the proceeds of the bonds a gross sum of \$100, which he should retain himself, leaving \$4,341.77 to be paid to the plaintiffs. He then added: "I will be satisfied and try to make up the deficiency in something else. * * * Let me know if I am not under all the circumstances pretty reasonable." In a postscript to this letter the defendant said: "I received your letter as to territorial warrants and ordered them forwarded (by telegram) some days ago." The plaintiffs' offer was to sell bonds and warrants. It was distinct and definite, and the parties became bound only when it was accepted by the defendant in terms equally definite. It is easy to see that the caution with which the defendant worded his telegrams of acceptance produced in the minds of the plaintiffs the doubt and uncertainty which followed. At first he said "*send them,*" which, of course, meant both bonds and warrants. But he immediately followed this by another dispatch to "*send bonds,*" which meant the bonds alone, saying that he could not use the warrants unless fundable in June. But he omitted to say that even if they were that he wanted them

sent or would accept them, and it was not till April 9, nineteen days after the bonds had been shipped, that he gave an unequivocal order to ship the warrants. To hold that this completed a contract to be performed only as an entirety, and that could not be performed distributively, would, as it seems to me, be going quite too far.

On the 29th of April the plaintiffs accepted the defendant's last proposition in the following letter: "Your favor of April 13th, notifying us of receipt of bonds is at hand. They were a long time on the road and we were quite anxious concerning them. The misunderstanding as to the kind of bonds we offered for sale we regret, and we certainly supposed Mr. Sherwood and yourself were posted as to the new issue of bonds, 12s, in accordance with a law of the legislature of '71, which forbids the issue of any bonds hereafter at a greater interest than twelve (12) per cent.

"Your letter states that you think that \$4,341.77, which brings the bonds down to a net figure of about 81 1-2c., would be fair for all concerned. In view of the fact that Sherwood's telegram stopped the shipment of territorial warrants, a portion of which you could have used (as it afterwards seemed) to good advantage, and that the transaction was conducted by you without any profit, we accept the change."

The plaintiffs subsequently drew their check upon the defendant for \$3,500, which was paid, and afterwards for the balance, which the defendant refused to pay for the reason that the warrants had not been delivered. One of the plaintiffs testified that the bonds and warrants drew the same rate of interest and were of equal value in the market, so that it could not be said, as matter of law, that the warrants were the principal consideration which induced the purchase, or that the omission to deliver them frustrated the objects of the contract. The case could not have been taken from the jury on that ground. A contract is entire when the parties intend that the promise by one party is conditional upon entire performance of his part of the contract by the other party. The contract is said to be severable when the part to be performed

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by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item or is left to be implied by law. (2 Parsons on Cont.; *Tipton v. Feitner*, 20 N. Y. 423; *Pierson v. Crooks*, 115 id. 554.)

Whether a contract is entire or to be taken distributively is often a question of intention and frequently one of fact. The original contract was for the delivery of two classes of securities at a common price, but it cannot be said, as matter of law, that the plaintiff then became bound to deliver bonds bearing a certain rate of interest or warrants fundable in June, and the subsequent correspondence related to these unsettled questions. The defendant, in his letter of April 13th, made a new proposition, which was subsequently accepted by the plaintiff, to accept delivery of a larger amount of bonds at a reduced price, and he promised to pay for them a specified sum, by honoring the sellers' check at sight. This promise was not conditioned upon subsequent delivery of the warrants. There is nothing in the letter to warrant such an inference. The contrary conclusion finds some support in the fact that he agreed to pay the purchase price at once, and did pay \$3,500, which he was not bound to do if the contract was entire and had not been severed by the correspondence. If the intention of the parties was not clear it was proper to submit the question to the jury. It could not be held that the defendant's contention was conclusively established since at least opposing inferences and different conclusions were possible. The question was not whether the parties had made an entire contract in the first instance, but whether it was such at the close of the correspondence, or when the plaintiffs accepted defendant's proposition to pay another price for another amount of bonds. Nor was the question one whether the defendant had or had not waived the delivery of the warrants, but whether the parties intended, in making and accepting the last proposition, that such delivery should precede the defendant's obligation to pay any part of the purchase price of the bonds. The defendant's right to insist upon the delivery of the warrants

and to claim damages for the non-delivery may be conceded, but that would not prove that the contract was entire and had not been severed by the conduct of the parties. The defendant's telegram to send on the bonds was open to the construction which the plaintiffs put upon it, that he wanted them at all events. Except for this dispatch the bonds and the warrants would doubtless have been sent together. It was competent for the jury to find that by this telegram, the defendant's letter of April 13 and the plaintiffs' acceptance of the proposition then made, even if the delivery of the warrants was not waived, yet the parties had expressed an intention that the bonds and warrants might be delivered each at different times; that the parties had apportioned to each a different and distinct price or portion of the whole consideration; that the right to deliver one was not dependent upon the delivery of the other, and as no time of credit was given payment for each class of securities was to be made upon delivery. The correspondence was fairly open to the inference which the jury evidently drew, that the parties intended to so change and shape the contract as to render it capable of performance on either side in parts, and so not to be taken as entire, but separate or divisible. The bonds to be delivered, accepted and paid for at once; the warrants subsequently, when the misunderstanding as to their form and character had been cleared away. That the contract had thus been severed by the parties is made clearer by the form of the pleadings. The plaintiffs alleged in their complaint the sale and delivery of the bonds at a specified price, and nothing else. The defendant did not plead non-performance of an entire contract as a defense, or at all, but alleged as a separate defense, "by way of counterclaim," that the plaintiffs had sold to him and agreed to deliver, among other things, convertible territorial warrants to be of the par value of \$5,000 at eighty-five; that they had not delivered them, and demanded judgment dismissing the complaint and for his damages for failure to deliver. The defense was not that an entire contract for the sale and delivery of bonds and warrants was unperformed,

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but that the defendant had sustained damages in consequence of the non-performance of a separate contract to deliver warrants. But the court submitted to the jury, not only the defendant's claim for damages under the counterclaim, but also the question whether the contract was entire or had been severed, which was not specifically raised by the answer at all, and the verdict was for the plaintiffs. I think there was no error in this disposition of the case by the trial court; that the finding of the jury is conclusive upon this appeal, and that the judgment should be affirmed.

All concur, except PECKHAM, J., dissenting.

Judgment affirmed.

THE PEOPLE ex rel. LUOY D. KITTREDGE et al., Respondents,
v. JOHN MABIE, 2d, et al., Appellants.

The provision of the general act for the incorporation of villages (§ 33, tit. 8, chap. 291, Laws of 1870, as amended by chap. 870, Laws of 1871), which provides that "boards of supervisors of the several counties are hereby authorized and empowered to extend the boundaries of any incorporated village within their respective counties," only applies to villages incorporated under said act, not to those organized under a special charter.

The power so to extend the boundaries of a village specially chartered is not given by the provision of the act of 1884 (Chap. 308, Laws of 1884), declaring "that the trustees and officers of any village of this state created by special charter, shall have and possess the same powers as are prescribed in any general act for the incorporation of villages," etc. The added powers are given to the village officers, not to the board of supervisors, and they do not include the enlargement of the village boundaries.

Where, therefore, the board of supervisors of Westchester county, on petition of the trustees of the village of Peekskill, organized under a special charter (Chap. 117, Laws of 1888), passed an act extending its boundaries, and the village assessors included in their assessment on the lands so attempted to be brought within the corporate limits, *held*, that said assessments were illegal and were properly stricken from the roll.

(Argued April 23, 1894; decided May 1, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 14, 1893, which affirmed an order of Special Term striking from the assessment roll of the village of Peekskill certain assessments against the relators.

This was a proceeding by certiorari, under chapter 269 of the Laws of 1880, to reverse and strike from the assessment roll of the village of Peekskill, in the county of Westchester, certain assessments against the property of the relators which were alleged to be illegal.

Said village was incorporated under a special act in 1816, which was amended several times and finally revised and consolidated in 1883 (Laws of 1883, chap. 117), by which act its boundaries were fixed and declared (§ 1), and have not since been changed by any act of the legislature. On July 19, 1892, the board of supervisors of Westchester county, upon petition of the trustees of said village, passed an act by which the boundaries of the village were enlarged so as to include the houses and certain lands of the relators. Under said act the defendants, as assessors of said village, included in the village assessment roll said property of the relators.

Edward Wells for appellant. The writ is made returnable at a Special Term in the city of Newburgh. The Code (§ 2132) requires that when issued from the Supreme Court it must be made returnable at the office of the clerk of the county designated therein, wherein the determination to be reviewed was made. The cause must be heard at a General Term of the court. (Code Civ. Pro. § 2138.) The board of supervisors of Westchester county had power, on the petition of the village trustees, to enlarge the bounds of the village, and their act of July 19, 1892, was regular, legal and valid. (Laws of 1870, chap. 291, § 33; Laws of 1871, chap. 870, § 5; *Heckman v. Pinckney*, 81 N. Y. 211; *Harrington v. Rochester*, 10 Wend. 550; *McCanter v. Orphan Asylum*, 9 Cow. 437.) The action of the board of supervisors in enlarging the bounds was legislative and not judicial, and cannot be

reviewed by certiorari. (*People v. Suprs.*, 25 Hun, 131, 135.) The suggestion made by the relators, that the act of the supervisors enlarging the bounds is void, because it does not affirmatively appear that the new territory contains 300 resident inhabitants, as required by section 1 of act of 1870 (Chap. 291, p. 1972), as amended by act of 1871 (Chap. 870, § 1, p. 674), is not tenable; that section applies only to the population necessary to organize a village under the general law, and has no reference to a subsequent enlargement of territory, which does not require any particular number of resident population. (30 Hun, 649.)

George F. Canfield for respondent. Chapter 291 of the Laws of 1870, as amended by chapter 870 of the Laws of 1871, did not confer upon the board of supervisors of Westchester county the power to enlarge the boundaries of the village of Peekskill, as prescribed in the act of said board of July 19, 1892. (*People v. Jaehne*, 103 N. Y. 182; *Oakes v. M. Bank*, 100 U. S. 237; *People ex rel. v. McClave*, 99 N. Y. 83; Laws of 1884, chap. 308.) The jurisdiction of the assessors and that of the board of supervisors cannot be presumed, but must be affirmatively shown. (*People v. Morgan*, 55 N. Y. 587, 590.) The writ was properly directed, and was properly made returnable, and the cause was properly heard in the first instance at the Special Term. (Laws of 1880, chap. 269.)

FINCH, J. The village of Peekskill was organized under a special charter. (Laws of 1883, chap. 117.) It had no power to enlarge or extend its own boundaries, but was dependent for that expansion upon the authority of the legislature, exercised directly or through some permitted but subordinate agency. In neither mode was that authority given, and the claim of the village to the contrary, upon which it ventured to act, cannot be supported. That claim rests upon a construction of the general act for the incorporation of villages. (Laws of 1870, chap. 291, as amended by Laws of 1871, chap.

870.) That statute on its face and by force of its own express terms is confined in its application to and is operative only upon villages incorporated under it. (Title 8, § 28.) The further provision, therefore, upon which the appellant relies (§ 33), that "the boards of supervisors of the several counties are hereby authorized and empowered to extend the boundaries of any incorporated village within their respective counties," must be read with the previous limitation as applicable, not to all villages, but to such as shall be organized under the general act itself. Otherwise the later section is made inconsistent with the earlier one and the latter is contradicted. In framing a general act the object was to enable villages to organize under it without need of an application to the legislature for special power or authority; and a provision committing all questions of boundary extension to the county supervisors was natural and prudent. But special charters, under which separate villages were organized, had each their own peculiar features, and were intended to be left to the law of their organization, except so far as a later enactment applied, upon which also the appellant relies. That provides (Laws of 1884, chap. 308) that "the trustees and officers of any village of this state created by special charter shall have and possess the same powers as are prescribed in any general act for the incorporation of villages within this state, except as such special charter may be in conflict with any provision or provisions of said general acts." That statute does not go far enough for the appellant's purpose, or cover the situation. The added powers given are explicitly to the village officers and trustees, and not to the county supervisors, whose authority is in no respect touched or enlarged: and it is simply the power of officers under special charters to which is added the power conferred on similar officers under the general act. Under that the village authorities could not enlarge their own boundaries, and so were obliged to apply elsewhere. The powers of the boards of supervisors were enlarged by giving them subordinate legislative control over the boundaries of such villages as were

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formed under the general act, but no statute has authorized them to interfere with the lines of villages organized under special charters, and as to them the legislature has retained and not parted with its jurisdiction over boundaries. However broadly the word "powers" may be construed, as in *Freligh v. Saugerties* (70 Hun, 589), in which it was interpreted with great liberality, it is not elastic enough to add to and reach the powers of county supervisors, not named or referred to in the act.

The argument, that since the general act allows the county board to legislate "upon the petition" of the village officers, a power of petition is given to them which the law of 1884 carries over to officers under special charters, and, therefore, by implication we can say that the supervisors gained authority to act upon and grant the request, scarcely needs discussion. The clause referred to was merely a limitation of the authority conferred upon the supervisors, a condition precedent to their action, and not the grant of a new power to the village officers. Both sets of such officers, those under the general act and those under special charters, could petition for a change of boundaries, but one had to go with their requests to the supervisors and the other to the legislature.

It follows that the village was not enlarged, and the assessments founded on that supposition were properly stricken from the roll.

The order should be affirmed, with costs.

All concur.

Order affirmed.

142	848
158	837

THE PEOPLE ex rel. THE AMERICAN BIBLE SOCIETY, Respondent, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK, Appellant.

The legislature may release property which has been assessed for taxation, and this power may be exercised in any way and at any time during and before the completion of the proceedings for taxation.

Under the act of 1893 (Chap. 498, Laws of 1893), exempting from taxation so much of the real estate of certain religious corporations as is used exclusively for its corporate purposes, which act, by its terms, declares that it "shall take effect immediately," a corporation included in the act is exempt from a tax upon its real estate so used for the year 1893, where the assessment had not been completed, and so placed beyond the power of the taxing officers to change, prior to the time when the act became a law.

Said act became a law on April 29, 1893. All of the real estate of the relator, a religious corporation in the city of New York, was assessed for that year. *Held*, that, as by the New York Consolidation Act (Chap. 410, Laws of 1882), the books containing the "annual record of the assessed valuation of real and personal estate" remain open until the first day of May, and up to that time the commissioners of assessment and taxation have power to correct them in respect to valuations, the real estate used exclusively by the corporation for its own purposes was exempted from taxation; that the commissioners were authorized and required to remove the entry thereof from the books; and that a mandamus requiring the commissioners to remit the tax assessed thereon was properly granted.

(Argued March 23, 1894; decided May 1, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 6, 1894, which affirmed an order of Special Term directing a writ of mandamus to issue to defendants, commanding them to remit of the tax of 1893 levied on the real estate of the relator so much thereof as was assessed upon that portion of the real estate used by the relator exclusively for its own purposes.

The facts, so far as material, are stated in the opinion.

George S. Coleman for appellants. A statute is always presumed to be prospective in its operation unless the contrary is expressly provided, or is necessarily to be inferred.

(*McMahon v. Beekman*, 65 How. Pr. 427; *Mygatt v. Washburne*, 15 N. Y. 316; Laws of 1890, chap. 494; *Reid v. Mayor, etc.*, 68 Hun, 116; *People ex rel. v. McCall*, 94 N. Y. 590; *In re Miller*, 110 id. 216; Laws of 1880, chap. 542; *People ex rel. v. Davenport*, 91 N. Y. 585.)

Frederick S. Duncan for respondent. The American Bible Society is a religious and missionary society. (Laws 1893, chap. 498.) Chapter 498, Laws 1893, going into effect on April 29, 1893, exempted the property therein mentioned from the tax of 1893. (*Valentine v. Comrs.*, 41 Hun, 373; Cooley on Taxation [2d ed.], 18; *Ketchum v. P. R. R. Co.*, 4 Dill. 41; *Bailey v. Mason*, 4 Minn. 550; 23 La. Ann. 511; Smith's Comm. on Stat. Const. 890; Laws of 1882, chap. 410, § 822.) No retroactive effect need be given to the act of April 29, 1893, in order to remit the tax of that year, because the tax for 1893 was not levied until after the act went into effect. (*In re Babcock*, 115 N. Y. 456; *Ketchum v. P. R. R. Co.*, 4 Dill. 41.) The argument of the commissioners that the affirmance of the order of the courts below will work injustice to New York county, because it has to pay its quota of the state tax prior to its collection from the taxpayer, is untenable. (*Ketchum v. P. R. R. Co.*, 4 Dill. 41.)

GRAY, J. The relator was one of the religious societies, or corporations, referred to in chapter 498 of the Laws of 1893, and claims to have been exempted from taxation for the year 1893, by force of the provisions of that act. Section I provided that the real property of such a corporation, "shall be exempt from taxation" and section II provided that "this act shall take effect immediately." It became a law, with the governor's approval, on April 29th, 1893. The sole question presented was whether the language of the act should be construed to have prevented any tax from being imposed or collected for the year 1893. We think that the order of the Special Term, directing the commissioners (through the writ of mandamus) to remit the tax for that year, has been prop-

erly affirmed below. It is true that there is nothing in the act authorizing us to give retroactive effect to its provisions; a construction which, in the absence of language containing an unmistakable direction, legislative acts should not receive. But we are not called upon to give such a construction. The point is whether immediate effect could be given to the legislative provision. Could property, which then was in the course of assessment for purposes of taxation, be withdrawn therefrom? All we have as to the legislative intention, when the act should be operative, is what we read in the second section. While the legislature commanded that its act should have immediate effect, we should not, and we need not here, infer any intention to discharge or release a tax, if, under the general tax laws, the proceedings for taxation had arrived at that stage, when the assessment was an unalterable fact, and beyond the power of the taxing officers to change. The legislative body will be presumed to be acquainted with the established plan of taxation throughout the state and to know of the processes, or successive steps, prescribed by law to be taken by taxing officers, in the assessment of property, subject to taxation, and in the imposition of the amount of the tax. They are presumed to know that under the plan, as prescribed for the city and county of New York in the Consolidation Act, there are limitations of time, which bear upon the liability of persons and the assessable character of property and the general powers of taxing officers. In the city and county of New York the books, which contain the "annual record of the assessed valuation of real and personal estate," are opened upon the second Monday of January and remain open until the first day of May. Within that period of time the commissioners have the power to correct the books; but on the first of May they are closed by direction of the statute. We have had occasion to consider the law, which thus regulates taxation in the city and county of New York, and it must be regarded as settled that the assessable character of property is fixed on the second Monday

of January. There is power conferred upon the commissioners by the statute, during the time the tax books are open, to correct them with respect to valuations; but, on the first day of May the books are closed by law, and there is no provision for the amendment, or alteration of the record. (Consol. Act, § 817; *Sisters of St. Francis v. Mayor, etc.*, 51 Hun, 355; affirmed 112 N. Y. 677; *Association for Colored Orphans, etc., v. Mayor, etc.*, 104 id. 581.)

The judicial functions of the tax commissioners terminate upon the first day of May, and thereafter the duties are of a clerical nature. But it is indisputable that the legislature may release property, which has been assessed for taxation. The power over the subject is unlimited and can be exercised in any way and at any time during the proceedings for taxation. If it is claimed that a legislative enactment has arrested those proceedings at a stage when, by the general law, the tax books are closed and the assessable character of the property has been fixed, beyond the power of the taxing officers to alter, the language must be very explicit to warrant them in thereafter remitting the tax. In the *Colored Orphan Asylum* case (*supra*), the property, for which exemption was claimed, was acquired on July 31st and its claim was refused, upon the ground that as with the closing of the record on the first day of May the power of amendment or alteration had ended, the exemption given in the Revised Statutes must be regarded as prospective in its operation. In the present case, however, we have the command of the legislature, to exempt the relator, given at a time when the records, or tax books, are recognized by the general law to be open for correction. The implication, from the statutory direction that they shall be open, is that up to the date for their closing no basis is absolutely fixed for the subsequent proceedings for extending the amount of the tax upon the assessment rolls. We feel constrained to hold that the act having been given immediate operation, at a time when the tax books were directed by law to be open, the effect was to withdraw the property affected from all liability to taxation, and that the

tax commissioners actually had a warrant in law for the correction of the tax books by removing therefrom the entry of the property in question. We recognize the possibility that our decision may operate to release a large amount of property assessed for 1893, and that our construction ascribes to the legislature an intention which it may not, perhaps, have had. However that may be, we have, as our only guide, the language of the act; which, for being imperative as to the time for its provision to take effect, must be considered with reference to the existing condition of the proceedings for the imposition of a tax. That it would have been better legislation, by clear and appropriate language, to prevent any doubt with reference to the application of the exemption to pending taxation proceedings throughout the state, is one of those reflections not infrequently suggested by a consideration of legislative work.

The order should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. JOHN S. COYLE, Appellant, v. JAMES J. MARTIN et al., as Police Commissioners of the City of New York, Respondents.

While, where a decision of the board of police commissioners of the city of New York removing a patrolman from the police force has been affirmed by the General Term, this court cannot interfere if there was any evidence fairly sustaining the decision, it may review and reverse it where there is no real conflict in the evidence and there is a substantial failure of evidence to sustain the decision.

(Argued April 23, 1894; decided May 1, 1894.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made April 3, 1893, which affirmed proceedings of the respondents dismissing the relator from the police force, and dismissed a writ of certiorari to review such proceedings.

The facts, so far as material, are stated in the opinion.

142	352
145	412
146	545

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152	430

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158	97

142	352
j170	534

Louis J. Grant for appellant. The commissioners have failed to weigh the testimony offered before them according to legal rules, and to give effect to explanations which clearly show that though relator did strike Mildrum, yet the circumstances which are proved explain away the offense charged. (*People ex rel. v. MacLean*, 42 N. Y. S. R. 690; *People ex rel. v. French*, 123 N. Y. 636.) It was error to compel relator to testify against himself. (Laws of 1869, chap. 678.) This case is not one of extenuating circumstances; but the proof is absolute that Coyle was not guilty of the charge. Mildrum, by refusing to answer, showed that he was not telling the whole truth, and his testimony was all there was for the prosecution. (Code Civ. Pro. § 2140.)

George S. Coleman for respondent. The proceedings before the board of police upon the trial of the charge were regular and within the jurisdiction of that board. (Laws of 1882, chap. 410, §§ 250, 272.) The decision of the General Term upon the facts is not reviewable in this court. (Code Civ. Pro. § 2140; *People ex rel. v. French*, 92 N. Y. 306; *People ex rel. v. Campbell*, 82 id. 255; *People ex rel. v. Bd. Police*, 39 id. 517; *People ex rel. v. French*, 119 id. 517.) There was no legal error on the part of the commissioners in receiving the testimony of the defendant, and no sufficient objection was made to raise a controversy as to constitutional right under article 1, section 6 of the Constitution of this state. (*People ex rel. v. McClave*, 123 N. Y. 512; *People ex rel. v. Flanagan*, 93 id. 97.)

EARL, J. The relator, a patrolman, was dismissed from the police force of the city of New York for "conduct unbecoming an officer," in that "on the 26th day of April, 1892, he had an altercation with Patrolman Mildrum, during which he drew his club and struck Mildrum on the head, causing a slight scalp wound, during his tour of duty;" and this proceeding by certiorari was instituted to review the determination of the police commissioners.

While the General Term of the court below had power, under section 2140 of the Code, to weigh the evidence given before the police commissioners upon the trial of the relator, and, if it found that the preponderance thereof was against the facts there found, to set aside the determination there made, we have frequently decided that this court has no such power. (*People ex rel., etc., v. French*, 92 N. Y. 306; *People ex rel., etc., v. Board of Police Commissioners*, 93 id. 97; *People ex rel., etc., v. Board of Fire Commissioners*, 106 id. 257; *People ex rel., etc., v. French*, 119 id. 507.) If there is any evidence fairly sustaining the determination of the police commissioners we cannot interfere therewith. But where there is no real conflict in the evidence, and there is thus a substantial failure of evidence to sustain the determination, we ought, in the exercise of our jurisdiction, to review and reverse it, and we think this is such a case.

At the date mentioned the relator's post extended from 130th street northerly along Seventh avenue, and Mildrum's post extended from that street southerly along the avenue. The relator testified that while he was at the southerly end of his post Mildrum came to him and without any provocation applied to him vile and abusive epithets, which he specified in his evidence; that Mildrum rushed at him and grabbed him by the throat and attempted to strike him with his club; that he, the relator, acted in self-defense, and in doing so touched Mildrum with his club; that he broke loose from Mildrum and started to run away, and did run away from him; that Mildrum drew his pistol from his pocket and chased him and fired three shots at him; that as Mildrum was attempting to fire the fourth shot he turned and grabbed the pistol and the hammer thereof came down and cut his hand; that then, considering his life in danger, he struck Mildrum with his club, and that he acted from the beginning to the end of the affray in self-defense. He also stated that he had a pistol in his pocket during the affray, but did not draw it.

Louis Baecht and John F. Sullivan both testified that they saw the entire transaction between the relator and Mildrum,

and they confirmed the evidence of the relator in every material particular. Their evidence showed that Mildrum was the aggressor, and that the relator was acting in self-defense.

Owen Meehan, a witness for the relator, did not see the commencement of the affray, but he testified that when he came in view of the parties he saw Coyle running across the avenue and that Mildrum followed him and fired three shots at him; that after Mildrum had fired the third shot Coyle turned and grabbed the pistol and then struck Mildrum with his club; that he was acting on the defensive and his life was in danger.

William H. Wharton, a witness called against the relator, testified that he reached the scene of the altercation after it was about over. He saw blood on Coyle's hand and no marks whatever on Mildrum.

Cornelius G. Van Reypen, called as a witness against the relator, testified that he did not see the commencement of the altercation; that he heard the pistol shots and saw the relator and Mildrum clinched and scuffling in the avenue — evidently having reference to the time after the firing of the three shots, when the relator turned and seized the pistol in the hands of Mildrum. He said that Mildrum was the larger man and that Coyle then and there complained that Mildrum had attempted to shoot him.

Patrick Coyle testified that on the evening of April 26th he saw Mildrum at the station house in the presence of his son, the relator, and that Mildrum, speaking of the altercation, then said: "I am to blame for it. I lost my head. One thing I am glad I didn't kill him;" and in this evidence the witness was corroborated by the relator.

I have now called attention to all the material evidence in the case except that of Mildrum, and it shows a most outrageous assault by Mildrum upon the relator; that the relator acted in self-defense, and that, instead of deserving condemnation for what he did, he was entitled to commendation for his forbearance. One appointed to the police force does not

thereby lose his manhood, and when abused and assaulted he has at least the sacred right of self-defense; and upon this evidence it cannot be said that the relator transcended the bounds of a proper self-defense.

The evidence of these witnesses is not contradicted in its essential features by Mildrum. He claimed that the relator at the time of the commencement of the altercation was about twenty-five feet south of his own post on his, Mildrum's, post, where he had been standing for a few minutes. He testified that he walked across the avenue, and asked him what he was doing there. It does not appear that he had any right whatever to interfere with the relator. The record does not disclose that there was any rule or regulation of the police department which authorized him to drive or eject the relator from his post. He testified that he did not commence the altercation, and denied the use of the vile language testified to by the other witnesses. He admitted that a pistol was drawn during the affray, but declined to answer by whom it was drawn. He admitted that Coyle ran away from him, but declined to answer whether he fired the three shots at him while he was running. He admitted that Coyle grabbed his pistol and that he ran after him about fifty feet; but he did not deny that he attempted to grab the relator by the throat. While he denied some of the details testified to by the other witnesses, the material and vital facts testified to by them stand uncontradicted. This is a case where, if the testimony of Mildrum furnishes any evidence in conflict with all the other evidence in the case, it is simply a scintilla, entitled to no weight and wholly insufficient to uphold the determination of the police commissioners.

Without, therefore, disturbing or departing from the rule laid down in the cases above cited, we think the order of the General Term and the determination of the police commissioners should be reversed, with costs in the Supreme Court and in this court to the relator.

All concur, except ANDREWS, Ch. J., not voting.

Ordered accordingly.

ALFRED BLEWITT, Appellant, v. WILLIAM B. BOORUM et al.,
Respondents.

The rule applicable to deeds or writings conveying or relating to the conveyance of real estate or an interest therein, that a delivery cannot be made conditionally, and that when delivered to a party the delivery operates at once and a condition attached thereto is unavailable, is not applicable to an instrument not in any way affecting real estate and which does not require a seal for its validity, and this, although the instrument is in fact sealed.

In an action, therefore, upon a contract executed under seal, but which does not require a seal for its validity, it is competent for defendant to show that the instrument was executed upon condition that it was not to operate as a contract until the performance by plaintiff of some prescribed act, and this may be shown by oral evidence.

(Argued April 24, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 6, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Isaac N. Miller for appellant. The court erred in admitting oral evidence to contradict a sealed instrument. (Chitty on Cont. § 4; 4 Kent's Comm. 451-454; *Wallace v. Berdell*, 97 N. Y. 13; *Arnold v. Patrick*, 6 Paige, 315; *Wilson v. Dean*, 74 N. Y. 531; *Weber v. Christian*, 121 Ill. 92; *Gavinzel v. Crump*, 22 Wall. 319; *Parish v. U. S.*, 8 id. 490; Greenl. on Ev. §§ 22, 275, 282; *Coe v. Hobby*, 72 N. Y. 141; *Allen v. Jaquish*, 21 Wend. 632; *Eddy v. Graves*, 23 id. 84; *Halliday v. Hart*, 30 N. Y. 493; *Hargrave v. Melbourne*, 86 Ala. 270; Story on Cont. 712-721; *Juilliard v. Chaffee*, 92 N. Y. 534; *Engelhorn v. Reitlinger*, 122 id. 76; *Thomas v. Scutt*, 127 id. 133; *Semittler v. Simon*, 114 id. 176; *Snowdon v. Guion*, 101 id. 458.) The rule excluding

142	357
145	665
142	357
149	587

142	357
172	1296
172	1802
172	1808
142	357
173	6

oral evidence applies to all sealed instruments. (*Marsh v. McNair*, 99 N. Y. 174; *Arnold v. Patrick*, 6 Paige, 315.) Under the pleadings defendants were estopped from denying ownership of plaintiff. (2 Herman on Est. § 575; *Reed v. McCourt*, 41 N. Y. 435; *Crane v. Morris*, 6 Pet. 598; *Carver v. Astor*, 4 id. 1; *Bruce v. U. S.*, 17 How. [U. S.] 437; *Sickles v. Flanagan*, 79 N. Y. 224; *Pollock v. Pollock*, 71 id. 137.) The court erred in finding in effect that the plaintiff never acquired the title to a half interest in this patent. (*Mumford v. A. L. Ins. & T. Co.*, 4 N. Y. 463; *Hogan v. Weyer*, 5 Hill, 389; *Fisher v. Fredenhall*, 21 Barb. 82; *Kneedler v. Sternbergh*, 10 How. Pr. 67; *Wheaton v. Baker*, 14 Barb. 594; *Jones v. Anderson*, 82 Ala. 392; *Snow v. Alley*, 144 Mass. 546.)

James L. Bishop for respondent. Upon this appeal the court can consider only the exceptions to rulings upon questions of law. (*Porter v. Smith*, 107 N. Y. 531.) Parol evidence is admissible to show that a written paper, which in form is a complete contract, of which there has been a manual tradition, was nevertheless not to become a binding contract until the performance of some condition precedent, resting in parol. (*Reynolds v. Robinson*, 110 N. Y. 654; *Harnickell v. N. Y. L. Ins. Co.*, 111 id. 390; *Juilliard v. Chaffee*, 92 id. 529-535; *Benton v. Martin*, 52 id. 570.) There is no exception to this rule arising from the circumstance that the signatures to the contract have seals attached to them. (Code Civ. Pro. § 840; *Ortman v. Dickson*, 13 Cal. 33; *Barton v. Gray*, 57 Mich. 634; *Canal Co. v. Ray*, 101 U. S. 522; *McCrary v. Day*, 119 N. Y. 1; *Bracket v. Barney*, 28 id. 333.)

PECKHAM, J. This action was brought to obtain an accounting from defendants and for damages sustained by plaintiff by reason of the violation of a certain contract, under seal, entered into between the parties to the action in relation to the right to manufacture and sell a temporary kind of binder for books, called the "Common Sense Binder," and for which letters patent had been issued.

The defendants admitted the execution of the contract, but alleged that it had been executed upon the parol condition that it was not to operate as a contract until the plaintiff acquired the interest of a third person in the patent spoken of in the agreement, and it was alleged that the plaintiff had never performed the condition. Evidence showing that the contract was executed with the condition above stated, and that the condition had never been performed, was offered upon the trial and received by the court, under proper objection and exception on the part of the plaintiff, and, after the evidence was in, the court found the fact in accordance with defendants' contention and gave judgment dismissing the complaint, which was affirmed at the General Term, and from such affirmance the plaintiff has appealed to this court.

The case of *Reynolds v. Robinson* (110 N. Y. 654) holds that a writing which is in form a complete contract, and which has been delivered, may be proved to have been delivered upon a parol condition that it was not to become a binding contract until the happening of some event in the future, and that such event had not occurred. The cases cited in the brief opinion fully bear out the statement.

The plaintiff here contends that the authority of that case must be confined to contracts which are not under seal, and, as the contract here was a sealed one, the case has no application.

Of course the mere presence or absence of a seal upon a writing would seem to be a matter of the smallest importance upon the question now under consideration. The same reasons would apply with equal force for receiving or rejecting the contemporaneous parol understanding where the writing was sealed, as where the seal was absent. It is a question in each case as to whether there has or has not been an executed and completed agreement or act. Many of the old English cases held the doctrine that where there was a writing bearing upon its face the marks that it was fully and completely executed, if there were a delivery of the writing to the party himself, there could be no parol evidence that the delivery was upon a condition or in escrow. The reason assigned in many cases

was that such evidence would lead to the result that a bare averment without any writing would make void every deed. The word deed was not used in its restricted sense of a written instrument conveying land, or some interest therein, but in the sense that it was a writing of the party, and hence his act or deed. In *Williams v. Green* (1 Croke's Eliz. 884) the action was one of debt on a bill. There was no seal attached. The plea was that the bill had been delivered to the plaintiff as a schedule (a memorandum), upon condition that if plaintiff delivered to defendant a horse upon a certain day, then the schedule was to be his *deed*, otherwise not, and that plaintiff had not delivered the horse. The plaintiff demurred to the plea, and it was resolved by the whole court to be a bad plea, for a *deed* could not be delivered to the party himself as an escrow, because then a bare averment without any writing would make void any deed. The decision was not based upon the question of a seal, and the paper was referred to as a deed simply by way of description of an act of the party in delivering a written instrument which ought not to be rendered void by a parol contemporaneous understanding or agreement. The reason would apply with equal force to all written instruments, sealed or unsealed. Other cases of a nature where the writings needed not to have been under seal, and where it was held that they could not be delivered *conditionally* to the party to the instrument, are cited in 2 Coke upon Lyttleton, 276 (Philadelphia ed., 1827; 1st Am. from last London ed.). On the other hand, there is one case which decided that a writing obligatory could be delivered in escrow to the obligee (*Hawksland v. Catchel*, 1 Croke Eliz. 835), but after differences of opinion among the judges it was finally resolved otherwise in later cases, as stated in Coke (*supra*).

These cases show that the rule preventing parol evidence of a delivery to the party upon condition, was not founded upon the presence of a seal to the writing, but the rule was adopted because when the words were contrary to the act (of delivery), the words were regarded as of no effect, for it was not what

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was said, but what was done, that was in such case to be regarded. Hence, a delivery to a party was said to be inconsistent with any condition attached to it, and a condition was in fact a contradiction of the writing, and parol evidence of the condition was, therefore, inadmissible. A different view was subsequently taken of this act of delivery. The courts said it was not a contradiction of the terms or legal effect of the writing, but it was proof simply that no contract had in fact been entered into. They said that the production of a writing purporting to be an agreement by a party, with his signature attached, afforded a strong presumption that it was his written agreement, but if at the time the parties agreed that the writing was not to take effect as an agreement until the happening of some event, in other words, that it was agreed upon conditionally, then it should not take effect until the happening of the event or the fulfilment of the condition. (*Pym v. Campbell*, 6 Ellis & Black, 370; S. C., 88 Eng. Com. L. 370.) CROMPTON, J., in the above case, in speaking of an instrument under seal, said it could not be a deed until there was a delivery, and when there was a delivery that estops the parties to the deed, which was a technical reason why a deed could not be delivered as an escrow to the other party. He said the parties may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement, for they never had agreeing minds. In truth, however, the Court of Exchequer in *Bowker v. Burdekin* (11 M. & W. 128), had already distinctly stated that a delivery of a deed to a party might be in escrow, even though the condition were not in express words, if from the circumstances attending its execution it could be inferred that it was not delivered to take effect as a deed until a certain condition were performed. Baron PARKE said in that case it was now settled law, though it was otherwise in ancient times, that in order to constitute the delivery of a writing as an escrow, it was not necessary that it should be done by express words, but you are to look at all the facts

attending the execution, and though in form it was an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will still operate as an escrow. The deed was in that case delivered to the party who was to take a benefit under it, and while the court held it was in fact an absolute delivery, the learned judges admitted that it might have been delivered conditionally to a party, and, if so, it would not take effect until condition performed. And in *Gudgen v. Besset* (6 Ellis & Bl. 986) the lease of premises for a term of years was signed, sealed and delivered to the party, although after such delivery the grantor retained the lease in his possession. The agreement was that it was not to take effect until lessee paid one hundred pounds, fifty only being then paid. The court from all the facts in the case held that the clear inference was that the instrument should not operate as a lease until full payment, and if there were such an agreement, though no express words of delivery as an escrow were used, it would not operate as a deed until payment was made, and consequently the lessee, although in possession of the premises, was tenant only from year to year, and not tenant under the deed, CAMPBELL, Chief Justice, holding that the formality of delivering the instrument to a third person as an escrow was not essential when it was intended to operate as such. Looking at all the facts the learned judge said it must have been the intention of the parties that the instrument should not operate as a lease till the money was paid, and that neither party intended that the interest in the term should vest till then.

As a result of the examination of the English authorities I think it is clear that the presence of a seal on a writing was not the reason for prohibiting parol evidence of a condition attached to a delivery to a party, but that where parol evidence was disallowed it was on the theory that otherwise it would be contradicting the writing. The rule was overthrown in England by the cases cited, which permit parol evidence that the delivery of a writing, although under seal, may be shown to have been under an agreement that it was not to operate as such until the happening of some future event.

In this state in *Lovett v. Adams* (3 Wend. 380) it was said by SAVAGE, Ch. J., that if a bond be signed and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act of the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent shall be performed. Until then there is no contract. The court held that evidence of such facts should have been admitted. So the presence of a seal was considered no obstacle to parol proof that the writing was delivered to a party to the instrument upon a condition which had not been performed. The rule in this state regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or as is said in escrow, and when delivered to a party the delivery operates at once and the condition is unavailable. (*Gilbert v. The North American Fire Ins. Co.*, 23 Wend. 43; *Worrall v. Munn*, 5 N. Y. 229; *Braman v. Bingham*, 26 id. 483; *Wallace v. Berdell*, 97 id. 13, 25.)

Whether there is any sound basis for a distinction between cases relating to real estate and other kinds of written instruments, it is not now important to inquire, for the rule that instruments of the former character cannot be conditionally delivered to a party is too firmly established in this state to be overruled or even questioned. In the case in 23d Wend. (*supra*) BRONSON, J., says it is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. In *Arnold v. Patrick* (6 Pai. 315) the writing involved was a deed of land, and the remark of the chancellor, that the rule applied to any sealed instrument, was beyond the question. He refers as authority for his statement to *Thoroughgood's Case* (9 Coke, 137a), reported in vol. 5, at page 241 of the London ed. of Coke's Reports, 1826.

The writing in that case was a deed conveying lands, but

cases are referred to in the report where bonds were thus delivered, and it was held that no condition could be attached to a delivery to a party. I have already stated, in reviewing the English cases, that the rule was not founded upon the presence of a seal, but because the delivery could not be contradicted by parol evidence of a condition attached thereto. Those old English cases have been passed over and substantially overruled by the English courts, so far as to hold that the delivery even of a sealed instrument to a party could be made conditionally. And the case in 3d Wend. (*supra*) shows that a bond could be delivered conditionally to a party.

In *Cocks v. Barker* (49 N. Y. 107) parol evidence was admitted to show that the bond was delivered conditionally, and the trial court found against that fact. In this court it was stated that the evidence was not admissible, because a deed could not be delivered to a party upon condition, citing *Worrall v. Munn* and *Gilbert v. Ins. Co.* (*supra*). It was not necessary to the decision, and I think the doctrine that a bond could not thus be delivered is not borne out by the cases in this state, and certainly not by the later cases in England already cited.

But a bond imports the existence of a seal, and the latter is requisite to the legal existence of a bond.

The instrument in this case was an ordinary agreement, not requiring a seal for its validity, and we think the rule as to sealed instruments, however far it may be carried in regard to such instruments as require a seal for their validity, should not be extended in any event to those cases where the instrument is in law not in the nature of a specialty, and where the presence of a seal is totally unnecessary to its validity.

I think myself the rule should not extend beyond what seems to be the settled law in this state in regard to deeds or writings conveying or relating to the conveyance of real estate, or some interest therein, but in this case it is not necessary to now go further than to hold the rule inapplicable to an instrument not in any way relating to or affecting real estate, and which does not require a seal for its validity, the

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seal being in such case and for this purpose regarded as surplusage, and the instrument should be held to come within the rule laid down in *Reynolds v. Robinson* (110 N. Y. 654, already cited).

The other cases cited in plaintiff's brief have been examined. With the exception of *Van Bokkelen v. Taylor* (62 N. Y. 105) they hold simply that parol evidence of a contemporaneous parol agreement, outside of and varying the terms of a written contract, is not admissible. We do not hold the contrary, but simply hold the parol evidence of an agreement that the writing should not take effect upon delivery until the happening of some condition is admissible in such a case as this. *Van Bokkelen v. Taylor* (*supra*) was a case of a composition release by creditors of a common debtor, and it was held that evidence of a secret condition attached to the execution or delivery of the release by one of the creditors was inadmissible, as such an agreement in regard to a composition release was void in any event. The case does not touch the question here involved.

We have looked through the other exceptions set forth in this record and find none that calls upon us to reverse the judgment, and it should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
HENRY E. KANE et al., Appellants.

Upon trial of an indictment under the provision of the Penal Code (§ 654), declaring it to be a crime, punishable as prescribed, where a person "unlawfully destroys or injures any real or personal property of another," these facts appeared: D. unlawfully placed a boat upon a pond owned by K.; he refused to remove it when required so to do by K., and several times, when the latter took it out of the water, he replaced it, and finally chained it to a tree to prevent further removal. Defendants, acting under instructions of K., to protect his possession from the trespass for which the boat was brought to the pond and used, and acting under advice of counsel, openly and without concealment took the boat from the water and broke it up. *Held*, that the evidence did not warrant a verdict against defendants, and the denial of a motion to set aside such a verdict was error; that the destruction of the boat, the instrument with which a persistent, repeated and defiant trespass had been perpetrated, was justifiable.

(Argued April 25, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 1, 1893, which affirmed a judgment of the Court of Sessions of Suffolk county, entered upon a verdict convicting defendants upon an indictment under the Penal Code (§ 654) charging defendants with unlawfully and willfully destroying a boat belonging to one Lewis S. Davis. It appeared that Davis had, without right, placed the boat upon a mill pond, which was the property of one Edward Kane. The latter put the pond in charge of his son, one of the defendants, with instructions not to allow trespassers upon it. Davis owned a farm adjoining said pond, and persisted in sailing his boat thereon, although several notices had been given him to remove it from the pond. On the day it was destroyed defendants found it afloat, fastened by a chain extending from its bow to a tree on Davis' land; they went in another boat, and, without going upon Davis' land, unfast-

ened the chain, took the boat out of the water and broke it up.

Further facts are stated in the opinion.

Livingston Smith for appellant. The fact of Davis having had his boat on the pond is no evidence of a user under a claim of right adverse to Edward Kane, and was no notice to him of a claim inconsistent with his rights or title. Davis trespassed on the pond of Edward Kane regardless of his protests and rights through malice and with an intent to injure and annoy him, and was, therefore, guilty of a misdemeanor. (Code Crim. Pro. § 56, subd. 18; *People v. Smith*, 5 Cow. 258.) The defendant Henry E. Kane, acting under his father, the owner, had the right to defend his possession of the pond. (*Carey v. People*, 45 Barb. 262; *Filkins v. People*, 69 N. Y. 101; *Bliss v. Johnson*, 73 id. 529; *People v. Kane*, 131 id. 111.) The defendant Henry E. Kane, aided by William Ford, destroyed the boat with the lawful intention of defending his possession of his father's mill pond; and to constitute the crime of unlawful and willful destruction of property it must appear to have been committed with a criminal motive. (*People v. Flack*, 125 N. Y. 324.) The defendant Henry E. Kane, aided by the defendant William Ford, had a perfect right to destroy the trespassing boat of Davis in defense of his possession of his father's mill pond; and if he did destroy it in defense of that possession the criminality is lacking which constitutes the punishable offense against the People. (*People v. Kane*, 131 N. Y. 111.) No crime was committed. (*People v. Kane*, 131 N. Y. 116.) The refusal to charge the jury that the ownership and possession of property confer a certain right to defend that possession, and that the means wrongfully used to invade and interfere with it may be lawfully destroyed, was error. (*People v. Kane*, 131 N. Y. 115.)

Walter H. Jaycox for respondents. The question whether the destruction of the boat by the defendants was unlawful was

a question of fact for the jury. (*People v. Kane*, 131 N. Y. 116; *People ex rel. v. French*, 92 id. 306; *People v. Hovey*, Id. 558; *People v. Boas*, Id. 562; *People v. Donovan*, 101 id. 632.) This court will not review questions of fact passed upon by a jury. (Code Civ. Pro. § 1337; *People v. Stone*, 117 N. Y. 483; *Ensign v. Ensign*, 120 id. 657; *People v. Wayman*, 128 id. 586; *People v. Trezza*, 125 id. 740; *People v. Loppy*, 128 id. 630.) The question of the unlawful character of the act of the defendants was fairly submitted to the jury. (*People v. Dimick*, 107 N. Y. 26; *Caldwell v. N. J. S. Co.*, 47 id. 282; *People v. McCallam*, 103 id. 597; *People v. Wright*, 138 id. 631; *Eggler v. People*, 56 id. 642; *Greenfield v. People*, 85 id. 76; *People v. Wilson*, 141 id. 191.)

FINCH, J. There was no evidence in this case to warrant the verdict of the jury, and the motion of the defendants to set that verdict aside should have been granted. The trial judge charged the jury that if the destruction of the boat was in the defense of the possession of property, the criminality was lacking which constitutes the punishable offense against the People. That charge was taken from the opinion rendered on an appeal from a previous judgment of conviction in this case (131 N. Y. 111), and should have ended the controversy, for the proof showed clearly that the boat was destroyed in an effort to protect property against a persistent, repeated and defiant trespass upon the rights of its owner. There was not a particle of evidence to the contrary, and not the least ground for the suggestion that the act may have been wanton and unnecessary, which is the palpable inference from the language of the charge. The act was done by the defendants under instructions from the owner to protect the possession against the trespass for which this boat was brought to the pond and used; they had no quarrel with its owner and no personal difficulty with him; they took the boat on the water and without trespass on his land; and broke it up in the daylight, near to a public highway, openly and without concealment and after advice by counsel that they had a right so to do. The

trial judge charged, as this court had already decided, that the owner of the pond was not bound to resort to an action at law instead of himself defending his possession. Granting that, what other effectual or reasonable remedy remained than to destroy the boat which was wrongfully on the pond, and put there and kept there for the avowed purpose of defying the owner's right? One remedy might be to remove the boat from the water. That certainly would be mild enough and was tried twice at least and failed. The boat was hauled out and left upon the land: the trespasser promptly shoved it back into the water. Then Kane, with the aid of a horse, moved it away from the shore and over a bank. The trespasser took his horse and replaced the boat in the water and chained it to a tree. Plainly, that sort of procedure was useless. Another remedy might be to endure the presence of the boat upon the water, but watch for the trespasser's use of it and then employ force enough to eject it and him. That would have been lawful (*Filkins v. People*, 69 N. Y. 101), but the defendants were not bound to wait for that, nor pursue a mode of resistance sure to end in personal violence. The only other remedy was to destroy the boat, and in that manner end the trespass. The law, in its own operation, in peculiar cases where the act is effectual to repress a wrong, does not hesitate explicitly to authorize the destruction of the instrument with which the wrong is both done at the moment and threatened for the future; as in the case of nets and seines used in violation of the restraints upon fishing: and so there was nothing inherently vicious in the character of the remedy. There was, therefore, in the facts of the case, as we said on the previous appeal, excusable cause for the act which the judgment rendered denounces as a crime and for which the defendants were sentenced to the penitentiary. The public law cannot so be wrested to the purposes of private and personal revenge in behalf of the original wrongdoer.

The courts below appear to have supposed that because we
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ordered a new trial there must have been in our judgment some question of fact for the jury. But we could not know what new evidence might be given. Proof was possible which would raise a disputed question of fact, and we had no right to assume that it might not exist. If we had been sure then, or could be sure now, that no other facts were possible of proof except those stated in this record, we might end the controversy quickly; but, instead, we must again reverse the judgment and order a new trial. If when that occurs the facts appear as they appear now it will be the duty of the trial court to order an acquittal.

How far one may go, what force he may use, what acts of defense are excusable in the protection of premises or property are usually mixed questions of law and fact to be submitted to the jury under proper instructions from the court (*Filkins v. The People, supra*), because always dependent upon the facts and circumstances of the particular case, such as the manner and character of the trespass, the instrumentalities through which it is accomplished, and the opportunities or reasonable means of defense. What we decide now is that upon the undisputed evidence in this record, and under the peculiar and specific circumstances disclosed, there was no ground for convicting the defendants of a criminal offense.

The judgment should be reversed, and a new trial granted.

All concur, except EARL, J., dissenting.

Judgment reversed.

MAXIMILIAN J. L. TOWLER et al., Respondents, v. BLANCHE
TOWLER, Appellant.*

Where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power unless coupled with a trust, is not imperative, but its execution depends entirely upon the will of the grantor. It is only when a power is in trust that a court of equity will decree its execution.

T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by will a life estate in one-third thereof to "any hereafter-taken wife." The grantor thereafter married, and died without executing the power. *Held*, that the widow was not entitled to any interest in the land; that the reservation at most created a mere power, and so, to be executed or not at the pleasure of the grantor. As to whether the reservation can be treated as a power within the meaning of the Revised Statutes (1 R. S. 792, § 105) *quære*. Reported below, 65 Hun, 457.

(Argued March 20, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. P. Rose for appellant. The execution of the power reserved in the deed of John Towler could not possibly suspend the power of alienation of the land for two lives in being. (*Everitt v. Everitt*, 29 N. Y. 71; *Purdy v. Hoyt*, 92 id. 451; *Beardsley v. Hotchkiss*, 96 id. 201; *Schmerhorn v. Cotting*, 131 id. 48.) The trust power is imperative and imposed a duty upon John Towler, the performance of which may be compelled in equity for the benefit of the party interested. (*Cutting v. Cutting*, 86 N. Y. 522; *Delaney v. McCormack*, 88 id. 180; *Perry on Trusts*, § 248; *Brown v. Higgs*, 4 Ves. 708.) The decision of the General Term practically nullifies and repeals the statute. (*Benton v. Wickwire*,

* This case was accidentally omitted in its order. — [REP.]

54 N. Y. 228, 229; *Rosenplaenter v. Roessle*, Id. 265; *F. A. Bank v. Colgate*, 120 id. 394; *Smith v. Acker*, 23 Wend. 653; *C. E. Ins. Co. v. Babcock*, 42 N. Y. 613; *McCluskey v. Cromwell*, 11 id. 603.)

Charles A. Hawley for respondent. It is to be noticed that the language of the deed is that of a reservation and not of an exception. A reservation to a stranger is void, for a grantor cannot covenant with a stranger to the deed. (*Ives v. Van Auken*, 34 Barb. 566.) The defendant takes nothing by virtue of the deed. Something more and further must be done before she has any legal interest in the premises. She is not a dowress, for her husband was not seized of an estate of inheritance in the premises at any time during the marriage. (4 R. S. [8th ed.] 434, § 1.) This was not a power coupled with an interest. (8 Wheat. 203; 3 Hill, 365.) If the word "power" be considered as having the technical and statutory meaning, even then the defendant must fail in her contention. (4 R. S. 2446, §§ 78, 95, 96; *Dempsey v. Tylee*, 3 Duer, 98; *Fellows v. Heerman*, 4 Lans. 256, 257.) The alleged power in trust was without consideration, and was not perfectly created by the deed. (1 Perry on Trusts, §§ 95, 96, 97.) Whether a trust is perfectly created is a question of fact in each case, and the same rules apply to powers in trust as to trusts in determining whether or not they are perfectly created. (*Levy v. Levy*, 33 N. Y. 107; *Holland v. Alcock*, 108 id. 316.) The power is upon its face discretionary and dependent upon the will of the grantor. It is not imperative. (Perry on Trusts, §§ 507, 508; *Colman v. Beach*, 97 N. Y. 558.) The statute against the suspension of the power of alienation applies to every species of conveyance or limitation, whether by deed or will, directly or in trust, and whether by trust or power in trust. (*Yates v. Yates*, 9 Barb. 346; *Booth v. Baptist Church*, 126 N. Y. 215; Chaplin on Suspension, §§ 62, 64-68, 298, 299; *Everitt v. Everitt*, 29 N. Y. 39, 71; *Schuttler v. Smith*, 41 id. 328; *Hanes v. Sherman*, 117 id. 422; *Jennings v. Jennings*, 5 Sandf. 174; *Lang v. Ropke*, 5 id. 363; *Beach*

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v. *Pond*, 23 N. Y. 69; *Gott v. Cook*, 7 Paige, 521; 24 Wend. 641; *Manice v. Manice*, 43 N. Y. 303.)

O'BRIEN, J. The plaintiffs are the children and sole heirs at law of John Towler, who died in the year 1889, and who, at the time of the conveyance in question, was seized of the real property described in the complaint. This action was brought to determine conflicting claims to this property under the provisions of § 1638 of the Code. On the 20th of June, 1881, the deceased was the owner in fee of the property and in possession and enjoyment. On that day he executed and delivered to the plaintiffs a conveyance of the land to have and to hold as tenants in common, subject to a life estate which he reserved to himself, declaring that the estate conveyed to the plaintiffs should only vest in possession upon his death. The conveyance was also subject to the following reservation:

"And further reserving to the party of the first part the power to devise, by last will and testament, an undivided one-third part of said premises unto any hereafter taken wife of him, the party of the first part, for and during the term of her natural life, or (at his option) to give and grant by deed, to said hereafter taken wife or to any person in trust for her, the same undivided third part of said premises for and during the term of her natural life."

On the 6th of August, 1881, after making this conveyance, John Towler, the deceased, married the defendant, and died on April 2, 1889, without having in any way executed the power reserved to him in the deed. The sole question in the case arises upon these undisputed facts. The defendant claims that by the reservation in the deed her deceased husband created in her favor a special imperative trust power, the performance of which will be decreed in equity, and since it was never executed it may now be considered as done for her benefit, and, therefore, that she is now entitled to a life estate in an undivided third of the premises. By § 96 of the article in the Revised Statutes in relation to powers it is provided

that "Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee the performance of which may be compelled in equity for the benefit of the parties interested." When the donee of a power such as is referred to in this section dies without executing it, equity will regard as done what it was the duty of the trustee to do, and so the title vests in the person for whose benefit the power was created. (*Smith v. Floyd*, 140 N. Y. 337.) In this case the grantor to the plaintiffs granted or conferred no power to any third person to create by means thereof any future estate, but reserved that power in himself. By § 105 of the statute the grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another. And every power thus reserved shall be subject to the provisions of this article, in the same manner as if granted to another. We think that this reservation in the deed at most created nothing more than a mere power, not coupled with any trust. It is not a special imperative trust power within the meaning of the statute, but a power which the grantor reserved, and could execute or not at his pleasure. He could not have been compelled to execute it in his lifetime, and had he before his death conveyed all his interest in the estate to the plaintiffs they would have taken the whole title in fee simple, unfettered by any trust or interest of any kind in favor of the defendant. An instrument creating a power, like all other instruments, must receive a reasonable construction, and the intention of the party executing the instrument is to be ascertained from the language used, the situation of the parties, and all the surrounding circumstances. (Perry on Trusts, § 248.)

Applying these rules of construction to the reservation in the deed, we think that the grantor never intended to and did not in fact create a special trust power which was imperative within the meaning of the statute. Had he granted this power to another his intention to create a trust and to make its execution imperative would be a reasonable inference from

the language as well as from the circumstances, and the statute would then operate upon it. But here he simply reserved to himself a certain estate in the land, and certain powers over it which he always had, and never conveyed or surrendered to any one. As to every interest in the land and as to every power over it which was not conveyed to the plaintiffs, the deceased held it as before, unfettered by any trust power or other limitation. By reserving power to create a life estate in an undivided third of the land he limited the operation of his grant to the plaintiffs, but he imposed no obligation upon himself or upon the land in favor of the defendant that did not exist before the execution of the instrument. Any other view would require us to hold that the reservation by the grantor of this power was equivalent to the creation of a life estate in favor of the defendant. This would be giving to the deed an effect never contemplated by the grantor, and creating an imperative trust power in a manner not intended by the statute. But it is said that the power is imperative unless its execution or non-execution is made expressly to depend upon the will of the grantee. If that section has any application to such a case as this it may be observed that when the reservation is read in the light of all the circumstances, it does appear that its execution or non-execution is made expressly to depend upon the will of the grantor in the deed. In conveying to his children he reserved certain interests and powers which he always had, that he could execute or relinquish at his pleasure just as he could convey his life estate. He created no obligation against himself, but was left perfectly free to do what he would with his own. From the very nature of the transaction, the situation of all the parties and the origin of the power itself, its execution necessarily depended upon the will and discretion of the person who reserved it. To say that by reserving it he imposed a duty upon himself with respect to its execution, is to assert that he could be compelled by a court of equity to abridge his own life estate in case the execution had been provided for by deed alone. The words of a power of this character are

not always confined to what they necessarily import in their strictest legal sense, but they are to be construed according to the intention of the party using them. (*Wilson v. Troup*, 2 Cow. 196.) This was a bare power to create a future estate reserved by the grantor as a part of his old dominion over the lands. Such powers as I understand it are never imperative, but their execution depends entirely upon the will of the donee. (2 Hilliard on Real Property, 617.) It is only when the power is a trust that a court of equity will decree the execution. That this was a mere power reserved, uncoupled with any trust, is shown by the fact that the deceased husband could have extinguished it by conveying his life estate to the children already entitled to the remainder. (4 Kent Com. 347.) He could have exercised this reserved power so as to confer a life estate in one-third upon the defendant, but it was optional with him to do so or not, and as he died without executing the power, the defendant has no interest in the lands.

I have thus far treated the instrument as a power within the meaning of the statute, though not imperative. The seventy-fourth section defines a power as an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. It is not by any means clear that the reservation in question is such a power. It is true that it is such in form, as it professes to confer authority to do some act in relation to lands or the creation of an estate therein. But his right to do all that can be referred to his original estate and the power growing out of that title, a part of which he still retained. In this view the writing cannot be said to confer any new power, but simply retains in the grantor the part of the estate not granted, and is a mere reservation and not in the nature of a power as that term is used in the statute. In any view, however, that may be taken as to the technical character of the instrument, the creation of a future estate in favor of the defendant was not an imperative duty imposed upon the deceased, but remained as before the execution of the instrument, purely discretionary.

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Statement of case.

These views lead to an affirmance of the judgment appealed from.

All concur (ANDREWS, Ch. J., GRAY and BARTLETT, JJ., in result), except EARL, J., who dissents on ground that the conclusion reached in the opinion nullifies section 105 of the statute.

Judgment affirmed. _____

ARTHUR J. CONNELLY, Respondent, v. THE MANHATTAN
RAILWAY COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that about seven A. M. of March 12, 1888, during a snow storm of extraordinary severity, known as the "blizzard," plaintiff entered a car on one of defendant's trains standing at a station. The track was blocked by other trains ahead which were stopped by the snow that clogged the tracks. Another train ran into that in which plaintiff was, causing the injury complained of. Prior to that time the storm had apparently abated; no accidents had, as far as was shown, occurred, and up to about that time the street surface roads had continued running their cars. The storm commenced again soon after and all traffic was discontinued. The weather forecasts of the day before gave no indication that such a storm was to be expected. It had stopped snowing about five A. M., and defendant's cars were crowded with passengers. Plaintiff claimed that the entire operation of the road should have been suspended. Defendant's counsel requested the court to charge that "the evidence did not justify a finding that defendant should not have operated its railway at all at the hour when the accident occurred." This the court refused, and submitted it to the jury to determine as to "whether the evidence does establish negligence on the part of defendant to operate at the time and at the hour specified." *Held*, error; that it was defendant's duty under its charter to continue to run its trains if practicable; and that the evidence did not authorize an imputation of negligence for not earlier suspending traffic.

Connolly v. Man. R'way Co. (68 Hun, 456), reversed.

(Argued April 27, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which modified and affirmed as modified

a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward B. Thomas for appellant. The court erred in its conception and application of the law governing the defendant's liability. (*Smith v. N. Y. C. R. R. Co.*, 24 N. Y. 222; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 408; *Cleveland v. N. J. S. Co.*, 68 id. 311, 313; *Dougan v. C., etc., Co.*, 56 id. 1, 7, 8; *Crocheron v. N. S., etc., F. Co.*, Id. 656; *Laflin v. B., etc., R. Co.*, 106 id. 135; *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562; *Searles v. M. R. Co.*, 101 id. 661; *Dobbins v. Brown*, 119 id. 188; *Warren v. F. R. Co.*, 8 Allen, 227; *Ryan v. M. R. Co.*, 121 N. Y. 126; *Foster v. People*, 50 id. 598; *Seymour v. Fellows*, 77 id. 178; *Burdick v. Freeman*, 120 id. 424.) The court erred in refusing to charge as requested concerning the effect of the evidence of the experts. (*Gardinier v. N. Y. C. & H. R. R. Co.*, 103 N. Y. 674.)

Jacob Fromme for respondent. The court was right in not dismissing the plaintiff's complaint. (*Webster v. R. R. Co.*, 115 N. Y. 112; *Brien v. R. R. Co.*, 109 id. 297, 300; *Seybolt v. R. R. Co.*, 95 id. 562, 568; *Caldwell v. Steamboat Co.*, 47 id. 291; *Edgerton v. R. R. Co.*, 39 id. 230; *Christie v. Griggs*, 2 Campb. 79; *Stokes v. Salstonstall*, 13 Pet. 181, 191, 194; *Carpue v. R. R. Co.*, L. R. [5 Q. B.] 747, 751; *Lanig v. Barr*, 8 Barr, 479, 482, 483.) Not alone did the plaintiff, by direct proof, show that the defendant was negligent, but he showed by defendant's own rules that it suggested in over twenty-three different ways how a person, using care, forethought and prudence, could have avoided the accident. (*Connelly v. M. R. Co.*, 60 Hun, 495; *Dlabola v. M. R. Co.*, 15 Daly, 470.) In the court below the defendant made no point nor did it claim that they had any ground of complaint of the rulings of the learned trial court in the admission or

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exclusion of evidence. Not having done so, it waived its right to any exception that it took in that behalf. (*Parker v. Steamboat Co.*, 109 Mass. 449; *Connelly v. M. R. Co.*, 60 Hun, 501, 503; *Higbee v. L. Ins. Co.*, 66 Barb. 462, 468; 53 N. Y. 603; *Brown v. N. Y. C. R. R. Co.*, 32 id. 603; 1 Greenl. on Ev. § 102; 1 Phil. on Ev. [5th Am. ed.] 147-150; *Barber v. Merriam*, 11 Allen, 322; *Roosa v. B. L. Co.*, 132 Mass. 439; *Matterson v. R. R. Co.*, 35 N. Y. 491; *Commonwealth v. Dorsey*, 103 Mass. 419, 420.) There was no error committed by the court in its charge or in its refusal to charge, or in the making of any qualifications to any of the requests to charge, that calls for a reversal of this judgment. (*Hickenbottom v. R. R. Co.*, 122 N. Y. 91, 99-102; *Clover v. G. Ins. Co.*, 101 id. 277; *Losee v. Buchanan*, 51 id. 491-493; *Caldwell v. Steamboat Co.*, 47 id. 282, 288, 289; *Sperry v. Miller*, 16 id. 407, 412; *Austin v. N. J. S. Co.*, 43 id. 75.)

ANDREWS, Ch. J. This action was brought to recover for personal injuries sustained by the plaintiff in the city of New York while a passenger on the defendant's railway, at about seven o'clock on the morning of March 12th, 1888, the day of the so-called "blizzard." The plaintiff entered the down-town train at 76th street, which was filled with passengers, and finding no vacant seat stood in the passageway. The track was blocked by the trains ahead, which could not get up the grade commencing at 76th street on account of the snow which clogged the rails and the spaces on each side. About twenty minutes after the plaintiff entered the car a train in the rear which had started from Harlem, drawn by two engines and having several cars crowded with passengers, ran into the train in which the plaintiff was, causing the injury of which he complains. It was claimed on the trial that the collision was caused by the negligence of the defendant (1) in not discharging the passengers on the train in which the plaintiff was when it was found that it could not proceed as required by the rules of the company; (2) in starting the colliding train from the 84th street station with directions to "skip the

76th street station," when it was known to the agents of the company, or ought to have been known to them, that the road was blocked at 76th street; (3) in running the train at a dangerous rate of speed from 84th street to the point of collision. The storm known as the "blizzard" was unprecedented in its character and severity. The weather forecasts published the day before gave no indication that such a storm was to be expected. It rained on the 11th, and about midnight the storm changed to snow, accompanied by a very high wind. The snow continued until about 5 o'clock of the morning of the 12th, when it stopped snowing for some hours. It then commenced to snow again, and continued snowing during the rest of that day and until the afternoon of the 13th. The traffic on the street railways was suspended from about 7 o'clock on the morning of the 12th and business in the city was to a great extent discontinued. The court left the question of negligence to the jury, and we think this was a proper disposition of the question.

But the court, we think, erred in refusing to charge a proposition requested to be charged by the counsel for the defendant and in the instructions following the request, to which refusal to charge and to the charge as made the defendant's counsel excepted. The defendant's counsel requested the court to charge "that the evidence does not justify a finding that the defendant should not have operated its railway at all at the hour when the accident occurred." The court said: "I do not express any opinion on the evidence; it is before you. It is for you to say whether the evidence does establish negligence on the part of the defendant to operate at the time and at the hour specified." By this charge it was left to the jury to determine whether the situation was such as to require the defendant, in the exercise of due care, to have wholly suspended its efforts to move its trains at and before the time of the collision. There was, we think, no evidence to justify the submission of this question to the jury. The storm had apparently abated. The trains of the defendant were crowded with passengers seeking passage to the lower part of the city. It

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was the duty of the defendant, under its charter, to operate its trains if practicable, for the convenience of the public. No accidents had, so far as appears, occurred on that day prior to the accident in question, and the road had continued its efforts to move its trains. Up to about the time of the accident the street surface roads had continued their traffic, and they naturally would be more likely to be impeded by the snow than the elevated roads. The forecasts of the weather were, as has been said, favorable. The jury were permitted to find that the defendant should, in the exercise of due prudence, have wholly suspended its operations before the time the accident happened, although the public were clamoring for transportation and crowding its cars for passage. We do not think that upon the evidence there is any warrant for imputing negligence for not earlier suspending traffic on its road. The main charge on this point it is said referred only to the question of negligence in running the colliding train from 84th street station, with directions to "skip 76th street," when the road was blocked at that point. But the request to charge and the instructions given thereon indicate that a broader contention was made on the trial, viz., that the entire operation of the road should have been suspended, and that negligence could be predicated upon the fact that the company undertook to continue the operation of its road.

For the error in the refusal to charge the proposition referred to, and in the charge made in response thereto, the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

142 382

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JOHN D. FORWARD, Respondent, v. THE CONTINENTAL INSURANCE COMPANY, Appellant.

A condition in a policy of insurance declaring it to be void in case the interest of the insured be other than unconditional absolute ownership, will not operate to avoid it after a loss, where the company, before issuing the policy, were advised and had knowledge of the fact that the insured was not the sole owner, or that the property was incumbered. The condition does not apply to facts so disclosed. O'BRIEN, J.; FINCH and PECKHAM, JJ., concurring; EARL and GRAY, JJ., dissenting.

A policy issued to plaintiff by defendant, through an agent, contained such a condition, and also provided that no agent of the company should have power to waive any condition, except such as by the terms of the policy were made the subject of agreement, and as to those, only by indorsing the waiver upon and attaching the same to the policy. The agent had power to solicit insurance, collect premiums, issue policies, and to waive conditions as provided in the policy. Plaintiff had, before the policy was issued, executed and delivered to his brother, an instrument in the form of a bill of sale of part of the property insured, which was filed in the town clerk's office. There was no consideration paid for the transfer, which was made in reference to certain litigations pending or threatened against plaintiff, and was intended to be colorable only. Plaintiff remained in possession, and the transferee never claimed any title to the property or right of possession. The agent was, before the issuing of the policy, notified of the existence of the bill of sale, its character and purpose. In an action upon the policy, *held* (O'BRIEN, J.; FINCH and PECKHAM, JJ., concurring; EARL and GRAY, JJ., dissenting), that defendant was chargeable with the knowledge of the agent, and so the condition was not available as a defense. Also, *held* (GRAY, J., dissenting), that the instrument did not constitute a transfer or incumbrance within the meaning of the policy.

Reported below, 66 Hun, 546.

(Argued May 3, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which denied a motion for a new trial, overruled defendant's exceptions and directed judgment in favor of plaintiff upon a verdict.

This action was brought to recover the amount of an adjusted loss under a policy of insurance issued by defendant.

The facts, so far as material, are stated in the opinion.

Myron H. Peck, Jr., for appellant. A policy of insurance, like other contracts, is presumed to embrace the entire agreement between the parties. After it has been delivered and accepted, parol evidence is not admitted to control or vary its terms. (*Mayor, etc., v. B. Ins. Co.*, 3 Abb. Ct. App. Dec. 251; *Pindar v. R. Ins. Co.*, 47 N. Y. 114-117; *Ripley v. A. Ins. Co.*, 30 id. 136; *Allen v. G. A. Ins. Co.*, 123 id. 6-12.) The bill of sale, whether intended to be absolute or as a chattel mortgage, transferred the title to the goods to the persons therein mentioned. (*Woodward v. R. Ins. Co.*, 32 Hun, 365.) Insurance policies must, like other written contracts, be so construed as to give effect to the intent of the parties as indicated by the language employed. Such a construction should be adopted as will uphold the whole contract and give effect to all its provisions in preference to one that will render some of its provisions nugatory. (*Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *O'Brien v. P. Ins. Co.*, 134 id. 28; *Weed v. L., etc., Ins. Co.*, 116 id. 106; *Armstrong v. A. Ins. Co.*, 130 id. 560; *Oakley v. Morton*, 11 id. 25; *Bogardus v. L. Ins. Co.*, 101 id. 328; *Reining v. City of Buffalo*, 102 id. 308.) There was nothing done by Hotchkiss that would constitute a waiver. (*Quinlan v. P. Ins. Co.*, 133 N. Y. 356.) The trial court erred in overruling the objection of the defendant to the evidence given by the plaintiff and his wife as to conversations had between them and the agent of the defendant, and in refusing to dismiss the plaintiff's complaint or to direct the jury to find a verdict for the defendant as requested and charging the jury, and in refusing to charge as requested. (*Allen v. Ins. Co.*, 123 N. Y. 6; *Quinlan v. Ins. Co.*, 133 id. 356.)

Safford E. North for respondent. The knowledge of the agent at the time the policy was issued of any fact or condition contrary to the terms of the policy is to be deemed the knowledge of the company itself; the agent's knowledge

is imputed to the company and by issuing the policy the company will be deemed to have waived the provisions, or, more properly speaking, to have accepted the risk as it existed. (*Carpenter v. G. Ins. Co.*, 135 N. Y. 298; *Berry v. A. C. Ins. Co.*, 132 id. 49; *Cross v. Nat. F. Ins. Co.*, Id. 133; *Short v. H. Ins. Co.*, 90 id. 16; *Woodruff v. I. Ins. Co.*, 83 id. 134; *Whited v. G. Ins. Co.*, 76 id. 415; *Van Schorck v. N. F. Ins. Co.*, 68 id. 434; *Æ. Ins. Co. v. Maguire*, 51 Ill. 342; *Minor v. Ins. Co.*, 27 Wis. 693; *Mechler v. Ins. Co.*, 38 id. 665; *Winans v. Ins. Co.*, Id. 342.) The charge of the court that the knowledge of the agent was to be deemed the knowledge of the principal was correct. (*Holden v. N. Y. & E. Bank*, 72 N. Y. 286; *The Distilled Spirits Case*, 11 Wall. 356; *Hoover v. Wise*, 91 U. S. 308; *Woodward v. R. Ins. Co.*, 32 Hun, 365.) The instruction of the court to the jury that they might disregard the erroneous statement in the proofs of loss as to the mortgage on the real estate, unless they found it had been made upon a material matter and with intent to cheat and defraud defendant was proper. (*Ins. Co. v. Weides*, 14 Wall. 375; *F. Ins. Co. v. Vaughan*, 92 U. S. 516; *Dolan v. Æ. Ins. Co.*, 22 Hun, 396; *Gibbs v. C. Ins. Co.*, 13 id. 611; *Rohrback v. Æ. Ins. Co.*, 62 N. Y. 613; *Titus v. G. F. Ins. Co.*, 81 id. 410-420; *Claflin v. C. Ins. Co.*, 110 U. S. 81.) The defendant is not in a position to maintain that plaintiff had not an insurable interest because of the bill of sale. (*Wood on Ins.* § 86; *Barry v. H. B. F. Ins. Co.*, 110 N. Y. 1.)

O'BRIEN, J. The judgment in this case was recovered upon a policy of insurance, issued April 23, 1891, at one year, upon a store and the goods therein, which were owned by the plaintiff. By the terms of the policy the risk was distributed as follows: Upon the store a sum not exceeding \$1,000, the goods a sum not exceeding \$1,200, and the furniture and safe a sum not exceeding \$100. The entire property was destroyed by fire on the 27th of September, 1891. The complaint alleges and the answer admits that the loss was adjusted and

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determined between the plaintiff and a general agent of the defendant on the 6th of October following at \$1,950, and the recovery was for this sum and interest. The only defense interposed by the answer or urged upon the argument of the appeal in this court was a breach on the part of the plaintiff of one or perhaps two of the conditions contained in the following clause of the policy :

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional, sole ownership, * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. * * * In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement, indorsed hereon or added hereto ; and, as to such provisions and conditions, no officer, agent or other representative of this company shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached."

It was shown at the trial that the plaintiff, about two months before the policy had been issued to him, had executed and delivered to his brother an instrument in the form of a bill of sale upon the stock of goods, furniture and fixtures in the store, which, on March 3, 1891, was filed in the town clerk's office. This instrument purports, in consideration of \$500, to transfer the plaintiff's interest in the property absolutely to his brother. The proof at the trial tended to

show that there was in fact no consideration for the transfer. That it was colorable merely and made between the two brothers with reference to some litigations pending or threatened against the plaintiff. The brother never in fact paid anything as a consideration for the transfer, and no debt was due or owing to him by the plaintiff. He never in fact claimed any title to the property or any right to its possession, which always remained in the plaintiff. There was also proof that the existence of this bill of sale, its true consideration, character and purpose were disclosed to the defendant's agent before the policy was issued or delivered. The court submitted two questions to the jury: (1) Whether the defendant, notwithstanding the condition of the policy, had knowledge of all the facts respecting the existence, nature and purpose of the bill of sale, instructing them that the knowledge of the agent was the knowledge of the company, and that if they found that the defendant had knowledge of the facts the policy was not avoided. (2) Whether a statement contained in the proofs of loss to the effect that there was no incumbrance on the property at the time was willfully false and known to be so by the plaintiff when he made the proofs, and was made for the purpose of defrauding the defendant, instructing them that if it was not then it did not amount to false swearing within the intent and meaning of a condition in the policy. The verdict was in favor of the plaintiff, and hence all the disputed facts material to the questions of law must be deemed to be established in the plaintiff's favor. It was said by Judge ANDREWS in *Walsh v. Hartford Fire Insurance Co.* (73 N. Y. 11), upon the authority of many cases, that "conditions for the pre-payment of premium and the like, which enter into the validity of a contract of insurance at its inception, may be waived by agents, and are waived if so intended, although they remain in the policy when delivered, and that a contract for renewal is for the purpose to be treated as the original contract." It has uniformly been held by this court that a condition of this character in a contract of insurance will not operate to avoid it after a loss, providing the company, before delivering the

policy, had knowledge of the fact that the insured, notwithstanding the warranty, or the statement and the condition, was not the sole owner or that it was incumbered. In such cases the company is deemed to have waived the condition, or by the delivery of the policy with the condition avoiding it in case the insured is not the sole owner, or that the property is incumbered, and accepting the premium, is held estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk. The cases on this point are numerous, and it is impossible to make any distinction in principle between the conditions considered and that involved in the case at bar. (*Van Schoick v. Niagara Falls Ins. Co.*, 68 N. Y. 434; *Whited v. Germania Ins. Co.*, 76 id. 415; *Woodruff v. Imperial Ins. Co.*, 83 id. 134; *Short v. Home Ins. Co.*, 90 id. 16; *McNally v. Phoenix Ins. Co.*, 137 id. 389; *Carpenter v. German Ins. Co.*, 135 id. 298; *Cross v. National Fire Ins. Co.*, 132 id. 133; *Berry v. American Central Ins. Co.*, Id. 49.)

In these cases it was held, either that the company had waived the condition, or was estopped by the delivery of the policy and the receipt of the premium, since, under such circumstances, it could not be supposed that it intended to deliver to the insured a policy which it knew to be void. When the underwriter, before the inception of the contract, is informed by the owner that the property is incumbered, but still delivers the policy with the condition embodied in it, then, as it seems to me, it is not so much a question of waiver or estoppel as a question whether the condition ever attached or operated upon the facts thus disclosed. It can, of course, operate in the future upon transfers or incumbrances as the facts arise, and then the question is one of waiver. But when the facts are all known before any contract is made, a condition against a state of things known by all the parties to exist cannot be deemed to be within their intention or purpose. This case cannot be taken out of the rule by any possible dis-

inction unless it be the character and powers of the agent of the defendant, to whom, upon the finding of the jury, the facts were communicated. It is urged that the cases cited do not apply for the reason that the waiver there was by a general agent. That may be true with respect to the four cases last cited. But it does not seem to me to be so much a question of power or authority in an agent to waive a condition in the contract as of knowledge by the company through its agent of the real facts. In the *Carpenter Case* (*supra*) the information as to the true state of the title was given to a mere clerk of the general agent, and we held that such knowledge was imputable to the company, through the general agent, for whom the clerk acted in soliciting the insurance, and that a condition of this character remaining in the policy did not avoid it. Now, the powers of the agent in this case were certainly much broader than those of the clerk in the case referred to. In this case the person to whom the information was communicated was certainly an agent appointed by the defendant itself, while in that the person had no authority directly from the company, but was a mere servant or clerk acting for and solely under the authority of the agent. The agent in this case and the clerk in the other were engaged in precisely the same duty and performing the same service when they acquired the knowledge as to the condition of the property and the state of the title. They were both soliciting insurance and ascertaining the character and condition of the property upon which the risk was about to be taken, and I am unable to suggest any reason for imputing knowledge in the one case and not in the other. Moreover, the record is entirely silent as to any facts tending to show that in this case the agent was acting in pursuance of a special or limited power. On the face of the policy he appears to be the duly authorized agent of the defendant and actually did grant special permits and waive conditions in the policy. He certainly had power to waive conditions, providing it was done in the manner stipulated in the policy, that is to say, in writing. He had power to solicit insurance, collect premiums and deliver policies.

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There is no proof in the record that the plaintiff ever made any formal application for this policy, written or otherwise, or that he touched the company at any point or in any form except through this agent. The fair inference from the proof is, that the defendant furnished the agent with policies duly executed, which he filled up and delivered at his discretion, reporting the facts to the company. There is nothing on the face of the policy and nothing was communicated to the plaintiff to lead him to believe that the powers of the agent were special or restricted. Insurance companies doing business by agencies at a distance from their principal place of business, are responsible for the acts of the agent, within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge. (*Insurance Co. v. Wilkinson*, 13 Wall. 222; *Mersebau v. Phoenix Mutual Life Ins. Co.*, 66 N. Y. 278; *Bodine v. Exchange Fire Ins. Co.*, 51 id. 117; *Arff v. Star Fire Ins. Co.*, 125 id. 57.)

It was held in the case of *Ellis v. Albany Fire Ins. Co.* (50 N. Y. 402) that an agent with precisely such powers as I have supposed the agent in this case possessed, could bind the company by a parol contract of insurance, while an application for a policy was pending, but none delivered till after a loss. I am unable to discover in the record any basis for the contention that the knowledge of the agent as to the existence and purpose of the bill of sale is not the knowledge of the defendant. On the contrary, his knowledge of the facts is, I think, imputable to his principal. So far as appears, the plaintiff dealt with him as the representative of the company. If there were in fact any limitations or restrictions on his powers as an ordinary agent it was for the defendant to show it. His commission was not put in evidence nor any proof given tending to show that he was not what he was described in the complaint, the defendant's duly authorized manager or agent at the place where the contract was made. There were no other means of communication between the plaintiff and the defendant employed. So far as appears he

made this contract for his principal, and the knowledge that he obtained in the course of the business was the knowledge of the defendant.

There is another view of the question that deserves some notice. Conditions in contracts of insurance against liability when the property is incumbered or where the title is not absolute in the insured are inserted for the purpose of guarding against the moral hazard involved. When the transfer or incumbrance is merely colorable or nominal and not real or effective the reasons that induced the stipulation do not apply. Was there any real sale or transfer of this property within the meaning of the policy? Nothing was done except to execute and file a paper. There was no intention in fact to transfer the title or vest any beneficial interest in the nominal vendee. There was no debt to be enforced, no consideration passed, and the use and possession remained unchanged. The filing of the paper added nothing to its validity. It was not a mortgage nor intended as security for any debt. It was a mere paper transfer without consideration and without delivery of possession, and while it had the form it had none of the legal elements necessary, even between the parties, to constitute a valid contract of sale. In legal effect it was, I think, the same as an unexecuted gift. The worst that can be said of it is that it was intended to defraud creditors, but if that be true the moral hazard which was the basis of the condition of the policy would still be absent, since the plaintiff's interest in the property at the time of the insurance was in fact the same as before the paper was executed. There is no legal ground upon which this court can properly disturb the verdict, and the judgment should, therefore, be affirmed.

FINCH and PECKHAM, JJ., concur.

ANDREWS, Ch. J., and BARTLETT, J., concur on last ground mentioned in opinion.

EARL, J., dissents on first ground and concurs on last ground.

GRAY, J., dissents.

Judgment affirmed.

WILLIAM B. DAYTON, Respondent, *v.* WILLIAM A. PARKE
et al., Appellants.

Where hearsay evidence only is given of a fact at issue in an action, it will not be regarded as sufficient proof of the fact unless it appears from the course of the trial that it was so received and accepted.

The Supreme Court has no power on appeal to add to a judgment a sum which it finds by the evidence to be due plaintiff, where the question as to what amount is due is one of fact, upon which either party might demand the verdict of a jury.

While a consignee, by simply accepting the goods consigned to him, and in the absence of any provision in the bill of lading providing for the payment of demurrage by him, is not liable therefor, where he is owner of the cargo, and the vessel is through his fault detained an unreasonable length of time at the port of discharge, he is liable for damages in the nature of demurrage.

In such case, however, not only must an unreasonable detention be proved, but, also, the damages, their nature and amount. Damages will not be presumed simply from proof of unlawful detention, and so, if plaintiff fail to prove any damages he is not entitled to judgment for even nominal damages.

M. & Co. chartered plaintiff's schooner for a voyage from Charleston to New York. The charter party contained specific provisions for the payment of freight at a rate specified, and for the payment of a sum specified for each day's unlawful detention. The cargo was consigned to defendants, who were the owners thereof. The bill of lading provided for the delivery of the cargo to the consignees, "they paying freight * * * as per said charter party and its conditions." Nothing was contained therein upon the subject of demurrage. In an action to recover freight and demurrage, *held*, that the reference in the bill of lading to the charter party was confined to the conditions of the latter instrument as to the payment of freight, and so, that the provisions of the charter party as to demurrage were not made part of the bill of lading, and defendants by receiving the cargo did not become liable to pay the rate specified, but the amount of damages sustained by the alleged unlawful detention was to be proved; and that in the absence of proof plaintiff was not entitled to recover nominal damages.

Wegener v. Smith (80 Eng. C. L. R. 285); *Moller v. Young* (24 L. J. 217);

Porteous v. Watney (47 id. 643), distinguished.

Reported below, 67 Hun, 137.

(Argued May 2, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 25, 1893, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a verdict directed by the court, and also appeal from so much of said order as affirmed an order of Special Term denying a motion for a new trial, and an order denying a motion for a re-taxation of costs.

This action was brought by plaintiff on behalf of himself and all the owners of the schooner *J. H. Parker*, to recover the freight on a cargo of railroad ties shipped by Mallonee & Co., of Charleston, S. C., the charterers of the schooner, and consigned to the defendants, and to recover demurrage at the rate stated in the charter party. Said charter party provided "that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports his vessel ready to receive or discharge cargo: For loading, cargo to be furnished at the rate of 40 M. ft. per day (Sundays excepted), and for discharging, customary dispatch. And for each and every day's detention by default of said party of the second part, or agent, fifty-two dollars shall be paid by said party of the second part, or agent, to said party of the first part, or agent."

The further facts, so far as material, are stated in the opinion.

Thomas J. Ritch, Jr., for the respondents. Where hearsay testimony is admitted without objection it is proper for the jury to consider it as a part of the evidence in the case. (*F. Bank v. Cowan*, 2 Abb. Ct. App. Dec. 88; *Ganson v. Tift*, 71 N. Y. 48; *Coolrick v. Swinburne*, 105 id. 503; *Denise v. Denise*, 110 id. 562; *Crane v. Powell*, 139 id. 379.) This is merely the case of an intermediate consignee (47 N. Y. 619, 620; 9 Hun, 378, 380) who was not a party to either the charter party or the bill of lading, and who, after, or, as is the case here, before the goods were consigned to him and before their receipt or delivery, had sold them to a third party. An intermediate

consignee is not, under these circumstances, liable for freight. The defendants were not liable under the charter party or the bill of lading, because they were not parties to either. They were not liable as consignees, because they were not the owners of the goods and did not receive them. (Abbott on Shipping, 423; *Elwell v. Skiddy*, 77 N. Y. 282; *Blanchard v. Page*, 8 Gray, 281.) The defendants did not, in fact, discharge the cargo or receive it. It was received by the final consignee, the Long Island Railroad Company, to which the defendants, the intermediate consignees, had sold the goods before they were shipped. The rule which permits a jury to infer a contract to pay freight on the part of a consignee, not a party to the charter party, and a bill of lading, is applicable only in cases where the consignee has actually received the freight. (Abbott on Shipping, 420, 421; *Dart v. Ensign*, 47 N. Y. 619; *N. Y. & N. H. S. N. Co. v. Young*, 3 E. D. Smith, 192; *Morse v. Pesant*, 3 Abb. Ct. App. Dec. 321.) But if there were evidence that the present defendants did receive the goods, they would still not be liable, as they had, before the receipt of the goods at New York, in behalf of Mallonee & Co., sold them to the Long Island Railroad Company. (Parsons on Shipping, 208.) Even if the general rule be that a consignee is, in the absence of proof to the contrary, presumed to be the owner of the goods, and as such becomes liable for the freight if he receives them — still the presumption does not arise unless the consignee receive the goods, and it is rebutted by evidence, such as exists in the present case, that the original consignee had ceased to be the owner. (Add. on Cont. 507; *Ackerman v. Redfield*, 9 Hun, 378.) The defendants' statement to the plaintiff's attorney that the claim for freight was correct does not help the plaintiff. (1 Greenl. on Ev. § 209; *B. H. M. Co. v. Messinger*, 2 Pick. 223; *Bloxam v. Elmie*, 1 C. & P. 558; *Paine v. Tucker*, 7 Shepley, 138; *Moore v. Hitchcock*, 4 Wend. 293; *Polk v. Robinson*, 1 Tenn. 463.) The trial court further erred in allowing as the amount

for freight \$1,667.55, with interest from July 12, 1891, instead of \$1,663.83, with interest from the same date. (*May v. Schuyler*, 11 J. & S. 95.) The plaintiff was not entitled to any recovery on his claim for demurrage. (*Gage v. Morse*, 12 Allen, 410; *School v. A., etc., Co.*, 101 N. Y. 602; *Cross v. Beard*, 26 id. 85; *Van Etten v. Newton*, 134 id. 143.) The trial court was clearly right in holding (and the General Term erred in holding the contrary) that, even if the defendants were liable for demurrage, there was no evidence upon which more than a nominal amount could be awarded to the plaintiff. (*Nelson v. Mayor, etc.*, 131 N. Y. 15.) The General Term further erred in making itself an absolute award of the sum of \$312 upon the plaintiff's cause of action for demurrage, instead of granting a new trial, so that the amount of the damage, if any, might be determined by a jury. (*Andrews v. Tyng*, 94 N. Y. 16.) If the judgment entered upon the verdict directed be affirmed, whether the amount of the recovery for freight be reduced or not, the order affirming the order denying defendants' motion for a new taxation of costs should be reversed, with costs, and an order made setting aside the taxation and directing the clerk to tax costs in favor of the defendants and against the plaintiff, and modifying the judgment accordingly. (Code Civ. Pro. § 738; *Bathgate v. Haskins*, 63 N. Y. 261; *Tilman v. Keane*, 1 Abb. Pr. [N. S.] 23.)

. *Edward M. Shepard* for appellants. The consignee is *prima facie* the owner. (*Sweet v. Barney*, 23 N. Y. 335; *Krenden v. Ellison*, 47 id. 36.) The consignee becomes by implication a party to the contract, or charter party, and these defendants became not only by implication but under the facts of this case parties to the charter party. (Story on Bailments, 608; *Shields v. Davis*, 6 Taunt. 65.) The construction of the contract is for the court, not the jury. (*A. F. Ins. Co. v. Austin*, 69 N. Y. 470; *Donaldson v. McDowell*, 1 Holmes, 292; *Lockhart v. Falk*, 44 L. J. Exch. 105; *Francesco v. Massey*, 42 id. 75.) The bill of lading contains such a reference to the charter party that by accepting it and

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the cargo covered by it, said defendants are bound by the terms of the charter party. (*Smith v. Sieviking*, 4 E. & B. 945; *Moller v. Young*, 24 L. J. Q. B. 217.) The defendants are liable for the damages stated in the charter party for every day's detention beyond the time required under the expression "customary dispatch" in discharging plaintiff's vessel's cargo. (*Brown v. Johnson*, 10 M. & N. 330.) The defendants did not discharge the cargo of plaintiff's vessel with "customary dispatch" after they provided a berth, and are liable for several days demurrage in that particular. (*Davis v. Wallace*, 3 Cliff. 123; *Thatcher v. B. L. Co.*, 2 Low, 362; *Keen v. Audenried*, 5 Ben. 535; *L. G. Co. v. Cusimano*, 10 Fed. Rep. 302.) Defendants are liable for nine days' demurrage. (*Born v. Johnson*, 10 M. & N. 833; *Sleeper v. Prig*, 17 Blatch. 44.) At no time did defendants suggest that there was any mistake or error in the amount of the freight, and presumably they knew just what they were saying when they stated, "the claim for freight is correct," This is an account stated. (*Lockwood v. Thorne*, 11 N. Y. 172; Story's Eq. Juris. § 526; *Willis v. Jernegan*, 2 Atk. 251.) The judgment is correct and plaintiff is entitled to costs. (*Tompkins v. Ives*, 36 N. Y. 77; *Johnston v. Catlin*, 57 id. 652.)

PECKHAM, J. The trial court directed a verdict for the amount of the plaintiff's claim for freight, together with six cents damages, for demurrage, and the judgment was thus duly entered, with costs. Both parties appealed, and the General Term, upon plaintiff's appeal, modified the judgment by increasing the amount allowed plaintiff for demurrage from six cents to three hundred and twelve dollars, and it affirmed the judgment upon defendants' appeal. The defendants have appealed here from the judgment as so modified, and also from several orders relating to costs, and to the amendment of the judgment as to the amount that should be directed upon the plaintiff's claim for freight. Upon the liability of the defendants for freight, we think, as the case appears here, the plain-

tiff had proved by uncontradicted evidence enough to warrant the court in directing a verdict.

The defendants, in addition to other evidence on the subject, admitted in so many words that plaintiff's claim against them for freight was correct. This did not preclude them from proving that the admission was erroneous, or from giving any other explanation of it that they could, but they did not prove anything of the kind, nor was any explanation of the admission attempted. It is, indeed, said that the course of the trial was such as to assume the sufficiency of certain hearsay evidence to prove the alleged fact that the defendants had sold the railroad ties to the Long Island Railroad Company, in behalf of the consignors thereof, before the vessel in which they were loaded left Charleston, and upon such alleged facts the defendants base their claim that they did not receive the cargo, and were not liable for the freight due the owners of the vessel upon its arrival at the dock of the Long Island Railroad Company. However that may be, we cannot say from a perusal of the record that this hearsay evidence was received or allowed upon the assumption that it proved the fact stated as hearsay. This hearsay evidence first came out in the course of the direct examination of a witness for the plaintiff who was giving material evidence in the case on the part of the plaintiff, and the mere fact that he stated some further matter as his understanding or as what he supposed to be true, cannot be grasped by the defendants as proof of the fact itself. This is true, even though on cross-examination as to what took place prior to the making of the charter party in question the witness reiterates his understanding that the ties which he was seeking a charter party to transport from Charleston had already been sold by defendants, as agents of the consignors, to the Long Island Railroad Company. It would seem from this record that the fact was stated as an understanding on the part of the witness, more for the purpose of identifying the ties than for any purpose of proving a sale, and the case fails to show that after this evidence had been so given the trial proceeded upon the theory

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that the fact had been sufficiently proved. Sometimes it does appear from the record that the trial has proceeded upon a theory that certain facts were properly proved, yet on appeal the case presents no sufficient evidence of them. In such case and in furtherance of justice the facts will be assumed in accordance with the theory. We cannot find enough in this case to warrant us in doing it here.

Witnesses in giving evidence in the course of an oral examination frequently state as facts those things which they plainly have no personal knowledge of. It would be too strict practice to say that unless a motion is made and the objectionable evidence is stricken out either party can refer to it as proof of the fact itself. Even where a witness is asked for evidence which is plainly hearsay, and he gives it as such, it ought to appear from the course of the trial that the evidence was received as sufficient proof of the fact concerning which it was given or it will not be so regarded. Receiving a copy of a written document instead of the original, and without objection that the original should be produced, is obviously a very different case.

In such event there is a direct offer to prove the original paper by the production of the copy, and the party against whom it is offered is then put to his objection, and if he fail to object to the admission of the copy he of course ought not thereafter to be permitted so to do.

The learned trial judge refused to regard the fact of sale as proved by this hearsay evidence. It is clear he did not suppose that the trial had proceeded upon any theory that such fact had in that way been sufficiently proved. This should render an appellate court still more reluctant to make such an assumption, especially where the record is not at all clear that the theory was assumed by both counsel. That the learned counsel for the appellant assumed it and regarded the fact as sufficiently proved is without doubt true, but confined as we are to the record for proof we are compelled to say that we do not find sufficient evidence that the fact was assumed on the trial to permit us to make the assumption here.

Ignoring the hearsay evidence the case is then bare of proof that would call for the submission of the question to the jury, whether the railroad ties in suit had been sold by defendants to the Long Island Railroad Company before the arrival of the vessel at the port of New York. This was the only question upon which counsel for defendants asked to go to the jury after the denial of his motion for the direction of a verdict in their favor. Upon this branch of the case we cannot see that any error was committed by the trial judge.

Another and a different question is presented with regard to the plaintiff's claim for demurrage.

The General Term has raised the amount recovered against the defendants from six cents to three hundred and twelve dollars. This amount was arrived at by allowing six days for demurrage at the rate of \$52 per day, as provided in the charter party. The provision in the charter party on the subject of demurrage was held to be binding upon the defendants, although they were strangers to the instrument. I am not aware of any provision of law which in such a case as this would permit the Supreme Court on appeal to add to the original judgment a sum which it finds from the evidence to be due plaintiff for demurrage, when the question as to what amount is due is one of fact upon which either party might demand the verdict of a jury. Aside from that question, however, there is the remaining and important one whether defendants upon this proof are liable in any sum whatever for demurrage. Demurrage, technically so called, is founded upon some contract entered into between the consignor or freighter and the ship owner, which, under certain circumstances, is held to be assumed by the consignee. (Abbott on Shipping, sec. 1, page 380, m. p. 303, *et seq.*) A delay beyond the time designated in the contract gives a cause of action in favor of the ship owner. Although it is said to be a claim in the nature of freight, yet it is perfectly distinct and separate therefrom. While a consignee, by accepting the goods consigned to him under a bill of lading by which the person receiving the goods is to pay freight, is held bound by an

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implied contract to pay the freight, yet, unless the bill of lading, either itself or by reference to another instrument, contain also an express condition providing for the payment of demurrage, the consignee in simply accepting the goods will not be liable for the payment thereof. (*Jesson v. Solly*, 4 Taunt. 52; *Brouncker v. Scott*, Id. 1; *Evans v. Forster*, 1 B. & Ad. 118; *S. C.*, 20 E. C. L. 420; *Van Etten v. Newton*, 134 N. Y. 143.)

At the same time, while not liable strictly for demurrage, yet a consignee of the cargo who is also the owner thereof may be liable for damages in the nature of demurrage when the vessel is detained, through the fault of the consignee, an unreasonable length of time at the port of discharge. (*Ford v. Cotesworth*, L. R. [4 Q. B.] 127; *Scholl v. Albany, &c., Iron Co.*, 101 N. Y. 602.)

In such case not only must the detention be proved, but the damages and their nature must also be the subject of proof. There is no express contract to refer to for the purpose of computing the amount to be paid as demurrage, and hence in an action to recover damages of that nature, proof must be given of their existence and amount.

The plaintiff claims he has proved the defendants liable for demurrage in its strict technical sense, by reason of the provisions on that subject in the charter party. The argument is that the defendants as consignees of the cargo, and by receiving the goods under the bill of lading, have made themselves parties to it, and that the bill of lading by referring to the charter party has made that instrument part of the bill, and defendants are, therefore, liable to pay whatever the charterers are liable to pay by virtue of that instrument thus made part of the bill of lading. In order to maintain the proposition that the provisions of the charter party upon the subject of demurrage form part of the bill of lading, the plaintiff must show that the two papers form on this question substantially one instrument, and that the bill of lading by its reference to the charter party upon this very point of demurrage makes the provisions of the charter party upon that subject

part of the substance of the bill of lading itself, and thus any one who becomes bound by the receipt of the goods under the bill of lading, becomes bound to pay demurrage under the charter party as a part of such bill. We do not think this argument can rest upon the facts in this case. The bill of lading is itself silent upon the subject of demurrage, and after acknowledging the receipt of the ties in the port of Charleston, S. C., the agreement, as stated in the bill, is to deliver the same "unto order or to their assigns, he or they paying freight for the said ties as per said charter party and its conditions, with primage and average accustomed." The charter party contained specific provisions for the rate of freight, and when it was payable.

It also contained specific and separate provisions as to the lay days for loading and discharging, and the amount (\$52) payable for each and every day's detention. This charter party was a contract between the ship owner and Mallonee & Co., the charterers, living at Charleston, and represented by an agent in New York, not the defendants, nor any one connected with them. We think the reference in the bill of lading to the charter party is plainly confined to the conditions of that instrument as to payment of the freight. The subject mentioned in the bill of lading is the cargo of railroad ties, and the agreement therein stated is to deliver the ties in New York to the consignees, he or they paying freight according to the conditions of the charter party. It would be a wide stretch to hold that by this language of the bill of lading, which plainly referred only to the provisions of the charter party as to the freight money, a consignee would become liable to demurrage if he accepted the cargo under such a bill.

The case of *Smith v. Sieveking* (4 E. & B. 945; S. C., 82 Eng. C. L. R.) had language in the bill of lading much the same as this, and the Court of Queen's Bench (1855) held the defendants (consignees) not liable for demurrage. The language of the bill of lading was "he or they paying for the said goods as per charter party, with primage and average

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accustomed." The charter party mentioned the rates of freight, and contained a stipulation that "for the payment of all freight and demurrage the captain shall have an absolute lien and charge on the said cargo." There was demurrage at the outport, and although the charter party provided for a lien on the cargo for all demurrage, yet it was held that obviously by the terms of the contract the *consignee* was not to pay for such demurrage.

In *Wegener v. Smith* (15 Com. Bench; *S. C.*, 80 Eng. C. L. R. 285) it was held that the jury might imply a contract on the part of the indorsee of a bill of lading to pay demurrage when the cargo was delivered under the bill to order "against payment of the agreed freight and other conditions, as per charter party." This is different language from that used in the case under consideration. The delivery was not alone upon condition of paying freight, but upon other conditions mentioned in the charter party, among these being a condition to pay demurrage. In the one case the delivery is not confined to the condition of payment of freight, and in the case at bar it is.

The plaintiff also refers as authority for his claim to *Moller v. Young* (24 L. J. 217, Common Law, 1855). The action was not, properly speaking, to recover demurrage, but was brought for detaining the ship an unreasonable time. The trial court at the Queen's Bench sittings in London directed a verdict for defendants on the admitted facts, with leave to enter verdict for fifty pounds for plaintiff, the court being at liberty to draw all inferences of fact. The damages sustained were in this way admitted to be fifty pounds if plaintiff were entitled to any, or the court could infer it from the facts in the case the same as a jury might. The court, on appeal, directed a verdict to be entered for the plaintiff. There is nothing to show any intention of overruling the cases above cited, which hold that there must be a specific contract to pay demurrage, and that in the absence of it it will not be implied. And if the bill of lading be silent on the subject of demurrage, and do not make the charter party on that particular

subject part of itself, no contract is proved from an acceptance of the cargo under a promise to pay freight as provided by the charter party.

In *Porteous v. Watney* (47 L. J. 643, Common Law Court of Appeal, 1878), also cited by the plaintiff, the bill of lading contained the words "paying freight and other conditions as per charter party." The charter party contained stipulations in detail providing for demurrage. The consignee was held liable for the payment of the same. In this case the court recognizes the rule that when the bill of lading only refers to the charter party by way of stating the terms of freight, such reference does not impose an obligation upon the consignee, or assignee, or other holder of the bill of lading to perform any other conditions of the charter generally. The opinions of THESIGER, COTTON and BRETT, Lords Justices, are plain upon this point.

I have been able to find no case where language in a bill of lading, such as is contained in this one, has been held to make the provisions of the charter party upon any other subject than the payment of freight part of the bill of lading.

We come then to the question of liability of defendants as consignees and presumed owners of the ties, for the payment of damages in the nature of demurrage for an improper detention of the vessel. On this branch the plaintiff has wholly failed to prove any damage whatever. Because the defendants might have been liable to pay those damages which the plaintiff might have proved if he had sustained them, is no reason for allowing the plaintiff to recover even a nominal sum by way of damages, when no amount of damages whatever has been proved. The plaintiff chose to plant himself upon his alleged right to recover demurrage technically so called, and for that purpose he refers to the bill of lading and charter party as forming a contract on defendants' part to pay a certain sum daily for each day's detention proved beyond the number allowed in the charter party. This claim, as we have seen, he cannot make good, and there is no reason why he should be permitted to recover even a small sum unproved,

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especially when the effect might be to saddle costs of the litigation, otherwise payable by plaintiff, upon the shoulders of the defendants. The plaintiff says he was entitled to a recovery of six cents, if for no other reason than to establish a principle. I see no principle that is established by such a judgment. In an action of trespass upon real estate where title comes in question it is easily understood that a verdict of six cents may be of the greatest value to plaintiff as establishing his title to the land so far at least as the defendant is concerned. No such principle obtains or can obtain in such an action as this. The cause of action of plaintiff in such a case consists of two branches, one to establish an unjust or unreasonable detention by defendants, and the other to show the damages which plaintiff sustains by reason of such detention. A failure to prove either fact, unlawful detention or damage ensuing, is a failure to prove a cause of action, and a plaintiff in failing to prove any damage whatever is not entitled to a judgment for nominal damages. It is not a case where the law will presume damage. It is a fact to be proved.

We think the best that can be done in this case is to reverse the judgment and grant a new trial, costs to abide the event, unless the plaintiff shall consent to reduce the judgment by striking out any recovery whatever for demurrage. In case such consent shall be given, then judgment shall stand for the reduced amount, subject to any further reduction if any shall be allowed by the decision of the court upon defendants' application for costs by reason of the offer made by them. No costs on this appeal are allowed to either party in case the judgment is affirmed by consent of plaintiff as reduced, and in that case the order denying motion to modify verdict is affirmed. The order denying defendants' application for taxation of costs must, in event of affirmance of the judgment by consent, be reversed, with leave to defendants to renew such motion upon the facts as now existing.

Judgment will accordingly be entered in accordance with this opinion.

All concur.

Judgment accordingly.

THE HANOVER NATIONAL BANK of the City of New York,
Appellant, v. SARAH F. BLAKE, Respondent.

Where a creditor signs a composition agreement, under a secret agreement with the debtor, giving him a preference or some undue advantage over other creditors, this does not, as to such creditor, nullify the composition agreement. The two agreements are to be considered as separate and independent, and, while the secret agreement is fraudulent and void, the composition agreement remains valid and enforceable.

In an action against defendant as indorser of a promissory note, it appeared that by a composition agreement between plaintiff and other creditors and their insolvent debtor, they agreed to take forty per cent of their respective claims and to receive therefor four notes of the debtor, each for ten per cent, two to be indorsed by defendant. She, at plaintiff's request, indorsed all the four notes executed to it. The action was upon one of the notes, which by the composition agreement defendant was to indorse. *Held*, that plaintiff was entitled to recover; that the indorsement of the two notes not covered by the composition agreement was invalid, but this did not invalidate or affect the indorsement of the other two notes made pursuant to that agreement.

Houden v. Haigh (11 Ad. & Ellis, 1033), disapproved.

Leicester v. Rose (4 East, 372); *Knight v. Hunt* (5 Bing. 432), distinguished.

It seems, that while in case of a secret executed agreement giving a preference to one of the creditors signing a composition agreement, the innocent creditors may elect to refuse to be bound by that agreement, if the secret agreement is executory they may not so elect.

Hanover Nat. Bank v. Blake (66 Hun, 33), reversed.

(Argued March 2, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 21, 1892, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

The action is brought by the payee of a promissory note against the indorser. The facts were not in dispute and were stated by the General Term, as follows:

Frederick D. Blake and Charles Waterman were partners engaged in the dry goods business under the firm name of F. D. Blake & Co. They were indebted to various creditors,

including the plaintiff, and, becoming insolvent, executed a general assignment of all their property to James H. Thorp on the 24th day of April, 1888. On the 4th of June, 1888, the creditors of F. D. Blake & Co. signed a composition agreement by which they agreed to take 40 per cent of their respective claims, to be paid by four notes made by the members of the firm, each for 10 per cent of the claim, two payable in six and twelve months, and two in eighteen and twenty-four months, the latter two indorsed by Sarah F. Blake.

The Hanover Bank, desiring to have the security of Mrs. Blake upon all the notes, asked that she indorse the first two as well as the last two, which she did. This was not known to the other creditors and was a security additional to that provided by the terms of the composition agreement.

The note in suit is the *third* of the series, payable in eighteen months, and properly indorsed by Mrs. Blake, in accordance with the composition agreement.

At the trial both parties moved for judgment; which the court directed for the defendant. At the General Term that judgment was affirmed and the plaintiff has again appealed to this court.

Thomas S. Moore for appellant. The secret agreement rendered void the indorsement by Mrs. Blake on the first two notes, that being a security additional to the terms of the composition agreement, but, under the facts in this case, the composition agreement is still binding upon the parties to this action, and the notes given in accordance therewith are enforceable. (*White v. Kuntz*, 107 N. Y. 518; *Russell v. Rogers*, 10 Wend. 473; *Fellows v. Stevens*, 24 id. 294; *Waite v. Harper*, 2 Johns. 386; *Yeomans v. Chatterton*, 9 id. 295; *Townsend v. Newell*, 22 How. Pr. 164; *Gilmour v. Thompson*, 49 id. 198; *Lawrence v. Clark*, 36 N. Y. 125; *Bliss v. Matteson*, 45 id. 22; *Harloe v. Foster*, 53 id. 385; *Baxter v. Bell*, 86 id. 195; *C. N. Bank v. Kohner*, 85 id. 189; *Goldenberg v. Hoffman*, 69 id. 322, 327; *Blair v. Wait*, Id. 113; *Almon v. Hamilton*, 100 id. 527.)

C. Bainbridge Smith for respondent. "Where a debtor in embarrassed circumstances enters into an arrangement * * * with his creditors to pay them a composition upon their claims, * * * any private agreement between such debtor and one of the creditors, who professes to join in the general arrangement, that the former, or a third party for him, shall pay a further sum of money, or give a better or further security than such as is provided for the other creditors, is void as a fraud on them. * * * Accordingly, if one creditor do make such stipulation, in fraud of the other creditors, the effect thereof will be to destroy any security which may have been given to him, even for the legal amount of the composition." (Chitty on Cont. [9th Am. ed.] 694; *Leicester v. Rose*, 4 East, 372; *Ex parte Sadler*, 15 Ves. 52; *Knight v. Hunt*, 5 Bing. 202; *Howden v. Haigh*, 11 Ad. & El. 1033; *Higgins v. Pitt*, 4 W., H. & G. 312, 323; *Pendlebury v. Walker*, 4 Y. & C. 424; *Bradshaw v. Bradshaw*, 9 M. & W. 29; *Mallalieu v. Mallalieu*, 16 Ad. & El. [N. S.] 689; *In re Hodgson*, 4 DeG. & S. 354; *In re Jarvey*, 36 Week. Rep. 367; *Clark v. Ritchey*, 11 Grant Ch. [U. C.] 490, 497; *Doughty v. Savage*, 28 Conn. 147; *Moses v. Katzenberger*, 1 Handy [Ohio], 46; *Frost v. Gage*, 85 Mass. 560; 2 Add. on Cont. 731; Leake on Cont. [3d ed.] 689; Wald's Pollock on Cont. 233; Chitty on Cont. [12th Eng. ed.] 699; Lawson on Cont. § 300.) The judgment should be affirmed. If the rule did not obtain that a secret bargain, by which a creditor exacted from the debtor an additional security, in violation of the terms of the composition, rendered the whole transaction with such creditor fraudulent and void, fraud would be encouraged and dishonesty rewarded. (Story's Eq. Juris. [1st ed.] 379; *Baldwin v. Short*, 125 N. Y. 553; *Britten v. Hughes*, 5 Bing. 460.)

GRAY, J. In the General Term opinion the question of law was stated thus: "Did the secret agreement, by which Mrs. Blake indorsed the first two notes, invalidate the whole composition agreement, so that notes given in pursuance of

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its terms are not enforceable by the plaintiff?" The learned justices, finding no controlling authority in this state, determined the question adversely to the plaintiff and upon the ground, in substance, that, as the agreement was fraudulent, the fraud permeated and vitiated the whole composition agreement and disabled the creditor from recovering anything under it. In this view we are not able to agree with them. It may be true that there was no decision in the courts of this state in its features so precisely in point, as to compel adherence to its authority and it is true that the view of the General Term has support in decisions of English courts. I think, however, that in our state there are expressions of opinion by eminent judges of this court and by a former very distinguished judge of the Superior Court of the city of New York, which rather commit us to a contrary view, and which should commend themselves to us as furnishing a wise and more politic rule, in these cases of compositions by an insolvent debtor with his creditors. The general principle has been long settled in England and here that a secret agreement, which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality; and that equality would be destroyed, if the secret agreement were given effect. In *Leicester v. Rose* (4 East, 372 at p. 381), Lord ELLENBOROUGH observed that the principle of all the cases was "that where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." In *Russell v. Rogers* (10 Wend. 474-479) Justice, (afterwards Chief Justice), NELSON said: "So scrupulous are courts in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if

unknown to the other creditors, is void and inoperative." It is in the extent of the operation of the principle, which was thus early asserted, that we will find the divergence of judicial opinions between English judges and those of this state. It is curious to observe that though *Leicester v. Rose* was relied upon as the basis of authority for their conclusions, the application of the doctrine of that case has been different in each country. *Leicester v. Rose* was decided in 1803. Its facts were that several creditors of the insolvent refused to sign, unless collateral security, which was to be given for the first two installments of the composition payment, should also be given for the last two. The defendant agreed to procure this additional security, and, not having done so, the action was brought to enforce his agreement. Lord ELLENBOROUGH stated the question to be, whether any legal effect could be given to such an agreement, which gave to some creditors a better security than to others, and he held that it could not, as it was a fraud upon the rest of the creditors. The case of *Howden v. Haigh*, (11 Ad. & Ellis, 1033), was decided in 1840 and was a suit upon composition notes. By a secret agreement between the plaintiff and defendant that the latter should indorse to him a bill, accepted by a third party, in order to give him a preference beyond the other creditors, the former had been induced to sign the composition deed. It was held that he could not recover. Lord DENMAN, relying upon *Leicester v. Rose* and *Knight v. Hunt*, held that every part of the transaction was avoided by reason of the deceit upon the other creditors. LITLEDALE, J., while agreeing with him that the fraud extended over the whole, remarked, rather significantly, "it is possible that the plaintiff may be entitled to sue for the original debt." The case of *Knight v. Hunt* (5 Bingham, 432), referred to by Lord DENMAN, if we are to regard the language of the opinion, did not expressly decide that the whole transaction was avoided. In that case the plaintiff had refused to accede to a composition of ten shillings in the pound, until a brother of the debtor agreed to supply him with coals to an amount in value equal to half the debt. The coals were fur-

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nished; but the notes remained unpaid and the plaintiff brought this suit upon them. BEST, C. J., stated the principle that the judgment of the creditors is influenced by the supposition that all are to suffer in the same proportion, and briefly concluded with the remark: "Here the plaintiff has had his ten shillings in the pound in coal, and he cannot have it again in money." In *Mallalieu v. Hodgson* (16 Ad. & Ellis [N. S.] 689) decided in 1851, ERLE, J., held that "where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void, not only can he take no advantage from it, but he is also to lose the benefit of the composition." In this ruling he relied upon *Leicester v. Rose* and *Howden v. Haigh*. The plaintiff there was seeking to recover for the balance of his original debt, after allowing for the amount of the composition and the value of a preference. It was his claim that the composition deed had not released the debt to him; because he had been induced to believe that he alone was preferred, whereas some other creditors had also been secretly preferred. It will be observed that in *Mallalieu v. Hodgson* it was unnecessary to decide whether the plaintiff had lost the benefit of the composition. The question was whether the plaintiff could defeat the effect of the composition agreement, by the plea that he had been deceived into supposing that he was the only creditor secretly preferred. As an expression of judicial opinion, it must, however, be accorded its weight as evidencing the continuance of the authority of *Howden v. Haigh*. That case furnishes the sole basis of authority, on which subsequent decisions and text writers have rested the doctrine that the fraud in the secret agreement with the creditor so vitiates the whole transaction of composition, as to disable him from recovering even the amount of the composition. (Leake on Contracts, 768; Chitty on Contracts, 694; Wald's Pollock on Contracts, 239.) I say the sole authority, because *Leicester v. Rose* did not go so far as that and *Howden v. Haigh* was an extension of the principle, which was supposed to be justified by Lord ELLEN-

BOROUGH'S decision in the former case. The doctrine of *Howden v. Haigh*, it may be observed, did not go wholly unquestioned in England: as may be inferred from the remarks of LITLEDALE, J., in that case, which I have quoted, and of Baron ALDERSON in *Davidson v. M'Gregor* (8 M. & W. at p. 763); who said he was "alarmed at the extent to which that decision goes."

In this state, with the case of *Leicester v. Rose* before him, Judge DUEK, in *Breck v. Cole* (4 Sandf. 79), formed quite a different conclusion, as to the extent of the effect of a secret agreement, which attempts to secure to a creditor an advantage over the other creditors. *Breck v. Cole* was an action upon a promissory note; secretly given to the plaintiff, in addition to the composition notes, as an inducement to him to agree to the composition. Judge DUEK in his opinion comments upon the fraudulent nature of the agreement, in its effect upon the other creditors; observing that "it is in all cases the concealment of a fact, which it was material for them to know and the knowledge of which might have prevented them from assenting to the composition * * * Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum, or the security, which the deed stipulates to be paid and given and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." The learned judge then adverts to the violation of the equality among creditors worked by secretly giving additional security and states this conclusion: "Hence, either the composition deed itself, * * * or the private agreement, which seeks to evade and, if valid, would defeat it, must be set aside, and sound policy and the principles of good faith require that the latter course should be followed. It is perfectly just that every creditor, who signs a composition deed, should be estopped from setting up any private agreement repugnant to its terms, or inconsistent with its intention and spirit and

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* * * every private agreement * * * is of this character and consequently, * * * every security, which is the fruit of such an agreement is illegal and void." He reviews the early decisions in the courts of England and of this state, and concludes that "it is the clear and inevitable result of the decisions that where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void as a fraud upon the creditors from whom it is concealed." The importance of this expression of judicial opinion should not, in my judgment, be underestimated. It was delivered by one of the most eminent judges in this state and was concurred in by his associates, Judges MASON and CAMPBELL. It does not appear from the opinion that *Howden v. Haigh* was before him; although it had been decided ten years before. But whether his attention was called to it or not, the learned judge's opinion was formed after considering the same early English cases, as were considered by Lord DENMAN in *Howden v. Haigh* and by Justice ERLE in *Mallalieu v. Hodgson*. Judge DUER limited the effect of the fraudulent secret agreement to the nullification of any rights or advantages attempted to be gained under it and regarded it as something quite separable from the composition agreement itself. From all the early cases in England and in this state the inference from the decisions is, not that the composition agreement is avoided, but, as Justice NELSON stated it in *Russell v. Rogers*, "the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, * * * is void and inoperative." So in *Fellows v. Stevens* (24 Wend. 294), Justice COWEN held that the law would set aside "all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors." It is the secret agreement itself which is fraudulent and void, (*Bliss v. Matteson*, 45 N. Y. 22; *Harloe v. Foster*, 53 id. 385.) And that is all that I think *Leicester v. Rose* decided. *White v. Kuntz* (107 N. Y. 518) is one of the latest cases, in

which this court has considered the effect of composition agreements. In that case the plaintiff had signed a composition agreement; by which he agreed with other creditors of the debtors to accept one-third of the indebtedness due them in four notes, to be indorsed by the father of the debtors. To induce the plaintiff to sign this agreement, Kuntz, the father of the debtors, secretly agreed to purchase of him the composition notes within a specified time and to pay \$10,000; the composition notes aggregating only about \$6,000. This secret agreement Kuntz refused to perform; alleging that it was null and void. Thereupon plaintiff brought an action; alleging these facts in his complaint and, also, that several other creditors had been induced to sign by a secret agreement to pay them a larger percentage than the one-third provided for in the composition agreement and, upon the ground that that agreement was void as to him, demanded its cancellation and that of the notes delivered under it and a judgment against the debtors for the amount of the original indebtedness. Demurrer to the complaint was sustained below and in this court the judgment was sustained. It was held that the agreement between plaintiff and Kuntz, the debtor's father, was fraudulent and could not be enforced and that the composition agreement as to all the innocent parties was avoided. As the plaintiff was not an innocent party; but had, himself, taken a fraudulent advantage, he could not set up the fraud of the creditors. The opinion discusses what were his rights. It was said that he had not forfeited all claims upon his debtors; that "he must have either the composition notes, or his original notes;" that he could not avoid the composition agreement as to himself and enforce his original notes for their full amount, as that would unjustly result in an advantage over the other creditors and "he should be held to the composition." "His only remedy," it was said, "against the defendants is upon the composition notes."

Judge EARL, in delivering the opinion in *White v. Kuntz*, cited the English case of *Mallalieu v. Hodgson (supra)* as an authority in point; but that he did not adopt the opinion

in all its expressions is evident; for he held that there was "no ground upon which he" (the creditor in the case before him) "can be deprived of all remedy."

It is very plain from the opinion in *White v. Kuntz* that it is the secret agreement, by which the creditor receives an undue advantage, which is deemed to be avoided. It was so considered, again, by Judge ANDREWS, in *Meyer v. Blair* (109 N. Y. 600); who, referring to *White v. Kuntz*, as authority for the statement that a collateral agreement is void in composition cases, which secures to one creditor an advantage over others, said "the court refuses to enforce the secret bargain and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept." In *Solinger v. Earle* (82 N. Y. 393) the facts were, that a third party had given his note for a portion of the insolvent's debt to the defendants, to induce them to agree to the composition. Having paid the note to a transferee thereof, he brought an action to recover back from the defendants the money so paid. It was held that the action could not be maintained; for, though the transaction was a fraud upon the other creditors, the parties were *in pari delicto*. Judge ANDREWS, remarking that fair dealing condemned such a transaction, said: "If the defendants here were plaintiffs, seeking to enforce the note, it is clear that they could not recover." Inasmuch as the note sued upon was for an additional amount, beyond the amount of the composition agreement, the remark of the learned judge was in line with all the authorities. He held the secret agreement was void and could not have been enforced. The case is in nowise in conflict with *White v. Kuntz*, or *Meyer v. Blair*.

If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt;

a view which LITLEDALE, J., regarded as probable in *Howden v. Haigh*.

It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement for any purpose. We assert a wholesome rule and one which works a just result, if we hold that the secret and fraudulent agreement, itself, is illegal and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition; though it has support in some of the English cases referred to. It seems to me the case falls easily within the rule, which permits a severance of the illegal from the legal part of the covenant. (*Pickering v. Ilfracombe Rwy. Co.*, L. R., 3 C. P., 235, 250; *United States v. Bradley*, 10 Peters, 343-360.)

In *Mallan v. May* (11 M. & W. 653) the plaintiffs, who were surgeon dentists, agreed to take the defendant as an assistant and to instruct him for a term of years and he agreed at the expiration of that term not to practice his profession "in London or any of the towns in, or places in, England or Scotland, where the plaintiffs might have been practicing." It was held that the covenant as to not practicing in London was valid, and that not to practice elsewhere was illegal; but that the valid part was not affected by the illegality of the other part. Here the agreement with other creditors for a composition was lawful and valid, (unless they should elect to rescind it upon the discovery of the secret agreement, an element not present); but the agreement for, and the giving of, additional security was unlawful and void. Is there any reason why the bad may not be rejected and the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiffs' original demand; or that it shall fall and leave the plaintiff at liberty to recover the original debt, I

am for upholding it and I fail to see why the legal part of the transactions had with it cannot be severed from the illegal part. We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory they may not so elect, and may rely that the creditor, secretly seeking to obtain some promise of advantage over them, will be prevented from enforcing it and from gaining anything by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation, which, from its inception, was unlawful and which the law annuls. (*Bliss v. Matteson*, 45 N. Y. 22.) It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain, there would be an inducement to an unscrupulous creditor to commit a fraud; for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent that may be true; but, on the other hand, it may be suggested that, if it were the rule, the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement and thus, by trick and device, to leave them wholly remediless; disabled to recover the amount of the composition and disabled from pursuing the original debt which the composition agreement released. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it

with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement. The conclusion reached is the result of a careful examination of the authorities and the doctrine they teach and it is in accord with a wiser policy. It must not be forgotten that the defendant's contract of indorsement is within the terms of the composition agreement, with respect to the note in suit. We know nothing of the fate of the earlier notes; the indorsement upon which by defendant was secretly and fraudulently procured to be added. She had a perfect defense to the enforcement of her contract. We are only concerned now with the question of whether the plaintiff shall have the amount of the composition; notwithstanding it may have been agreed secretly that it should have some better security for the payment of some of the composition installments. This question, for the reasons stated, should be answered in the affirmative and, therefore, the judgments below should be reversed and a new trial ordered; with costs to abide the event.

All concur, except ANDREWS, Ch. J., and PECKHAM, J., dissenting.

Judgments reversed.

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151	422
142	416
163	465
142	416
167	212
167	222

EDWARD W. HANKINS, Appellant, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Respondent.

Where a servant is injured by the negligent performance of an act or duty which the master as such is required to perform the latter is liable, although the negligence was that of another servant to whom the performance of the act or duty was intrusted, and this, without regard to the rank or title of the person guilty of the negligence.

The master is not relieved from liability in such case by the fact that he has promulgated rules or regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter.

A train dispatcher in ordering the movements of railroad trains, performs a duty resting upon the railroad company, and so as to its employees, his acts are those of the company.

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Statement of case.

Plaintiff, a fireman on one of defendant's freight trains, was injured by a collision with another train. Both trains were behind schedule time and their movements were controlled by special telegraphic orders from one of defendant's train dispatchers and the accident was caused by the negligence of the train dispatcher in giving those orders. In an action to recover plaintiff's damages, *held*, that defendant was liable.

(Argued April 26, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which affirmed an order denying a motion for a new trial and affirmed a judgment in favor of defendant entered upon an order non-suiting plaintiff on trial at Circuit.

This was an action to recover damages sustained by plaintiff while employed by defendant as a fireman on one of its freight trains in a collision between that and another train.

The facts, so far as material, are stated in the opinion.

W. H. Henderson and *W. S. Thrasher* for appellant. To make a time table, general or special, as in running trains under special orders, was the duty of the master, the performance of which could not be delegated to any servant of whatever rank, without making that servant the *alter ego* of the master, and the master liable for his negligence in the performance of that duty. It was a duty which belonged to the master to perform for the safety of its servants and of the public. The running of trains was the primary business of the defendant, and a time table, general or special, must govern and control absolutely every employee, and must necessarily emanate from the supreme head or authority, whosoever hand is used to promulgate and publish it. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 553; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Slater v. Jewett*, 85 id. 61; *Pantzar v. T. F. M. Co.*, 99 id. 372; *Crispin v. Babbitt*, 81 id. 521; *Benzing v. Steinway*, 101 id. 547; *McCosker v. L. I. R. R. Co.*, 21 Hun, 500; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332; *Dana v. N. Y. C. & H. R. R. Co.*, 92 id. 639; *Scott v. Sweeney*, 41

Hun, 292; *Campbell v. N. Y. C. & H. R. R. Co.*, 35 id. 506; *Sutherland v. T. & B. R. Co.*, 28 N. Y. S. R. 201; *Shiner v. Russell*, 112 N. Y. 680.) The plaintiff requested and was entitled to go to the jury upon the question of whether the defendant was negligent in not promulgating suitable rules and regulations for the running of its trains. The complaint states a cause of action for such negligence. The evidence made a case for the submission of this question. (*Abel v. D. & H. C. Co.*, 103 N. Y. 586; *Herbert v. D. & H. C. Co.*, 41 N. Y. S. R. 860; *Shepard v. N. Y. C. R. R. Co.*, 44 id. 816.)

James H. Stevens for respondent. The court properly granted a non-suit. (*Slater v. Jewett*, 85 N. Y. 73; *Monaghan v. N. Y. C. & H. R. R. Co.*, 45 Hun, 116; *Crispin v. Babbitt*, 85 N. Y. 516; 58 id. 27; *Sheehan Case*, 91 id. 334; *Shiner v. Russell*, 112 id. 680; *Loughlin v. State*, 105 id. 163; *Ford v. L. S. & M. S. R. Co.*, 17 N. Y. S. R. 397.) There was no error in the refusal of the trial court to submit to the jury the question whether the company had promulgated in this case suitable and sufficient regulations for the running of its trains. (*Berrigan v. N. Y., L. E. & W. R. R. Co.*, 131 N. Y. 582; *Potter v. N. Y. C. & H. R. R. Co.*, 136 id. 77; *Harley v. B. C. M. Co.*, 142 id. 31.)

PECKHAM, J. The non-suit in this case was granted on the ground that, assuming the negligence of the train dispatcher, the plaintiff cannot recover because it was the negligence of a fellow-workman. Whether the train dispatcher bore that relation to the plaintiff is in truth the only question in the case.

The facts are not complicated, and those which we regard as material are as follows: The division upon which the accident happened extends from Dunkirk on the west to Hornellsville on the east. The plaintiff was a fireman on a freight train (number 340), which on the 19th of October, 1887, had started from Dayton and arrived at Salamanca, a station on

defendant's road and within the above-named division, early in the morning on its way east towards Hornellsville, but the train had left Dayton and arrived at Salamanca several hours behind its schedule time, and its movements since leaving Dayton had been entirely controlled by special telegraphic orders from the train dispatcher at his office at Hornellsville.

At 7.57 of the day mentioned the engineer and conductor of this train received while at the Salamanca station an order by telegraph from Hornellsville and signed by the division superintendent and the train dispatcher, which order directed them to "meet trains 341, 339 and 349 at Carrollton ahead of train 348." Carrollton was a station a few miles east of Salamanca. The train consisted of 113 cars and was about half a mile in length and it started to go east as far as Carrollton under the above order very soon, or within a few moments after the order was received. The west-bound train number 341 had arrived at Carrollton several hours behind its regular time, and it was also being run by special telegraphic orders from the train dispatcher's office at Hornellsville. While at Carrollton on its way west, the conductor and engineer of this train received their telegraphic order at 8.43 A. M., which directed them to "meet train 334 at Carrollton, 348 at Salamanca, not pass Salamanca without orders." It was the duty of the conductor and engineer of this train, upon receipt of the order, to move their train west to Salamanca. This they at once proceeded to do.

Neither the engineer nor the conductor has any voice in running a train by special order; they are simply charged with the duty of carrying out the orders that come to them from the train dispatcher's office. These orders to the conductors and engineers of the trains numbers 340 and 341 were at once attempted to be carried out by them, and in consequence thereof the two trains came into collision not far from Carrollton and between 9.05 and 9.10 A. M.

The plaintiff was fearfully injured, his leg being almost torn from his body and he pinned down between the engine and tender and very badly scalded by the hot water from the

boiler of his engine. Amputation near the thigh was soon after performed, and the plaintiff, as might be assumed, suffered great agony from the injury and is rendered a maimed and wrecked individual for the balance of his life. There is no question of contributory negligence in the case, and it cannot be contended that the plaintiff was at the time of the accident engaged in anything other than an honest and careful performance of his duty. If these orders were negligently given, the sole question as to defendant's liability becomes one of law. There was enough evidence as to negligence on the part of the train dispatcher in the giving of the orders to require the submission of the question to the jury, provided the defendant ought to be held liable for his negligence. It frequently becomes very difficult to determine whether the particular act in any case is that of the master in his character as such, or is only that of a mere fellow-servant. It is not a question as to the rank of the individual who gives the order or performs the act. The question is one as to the character of the order or act, whether it is one which is given or performed as an order or act of the master in his character as such, or only as an order or act delegated by the master to another and performed by such other as an employee. The rule as to the liability of the master for the act of a servant is well known. CHURCH, Ch. J., said in the *Flike* case that the master must be held liable for negligence in respect to such acts or duties as he is required to perform as master, and without regard to the rank or title of the agent whom he has intrusted with its performance. (*Flike v. Boston, etc., Co.*, 53 N. Y. 549.) This language was repeated in *Crispin v. Babbitt* (81 N. Y. 516), where the liability of the master for the negligence of his servant, by which another servant has suffered injury, was said not to depend upon the doctrine *respondeat superior*, but upon the omission of some duty of the master which he has confided to such inferior employee. If the act omitted were of the kind which the master owed to the employee the duty of performing, he would be responsible to the employee for the manner of its per-

formance. It is not a question of rank among the different employees. The rule thus laid down has been since frequently approved in this court. (*Slater v. Jewett*, 85 N. Y. 62; *Cullen v. Norton*, 126 id. 1.) Its application to a particular case is sometimes difficult, and the boundary line between an act of the master and an act of the employee is sometimes quite vague and shadowy. In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road, and its furnishing general time tables pertaining thereto. Whether the train dispatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that if the train dispatcher had obeyed the rules the accident would not have occurred. If the defendant owed a duty as master to give correct orders to these trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he intrusted the performance of the duty to the train dispatcher.

These trains were being run without regard to their ordinary time tables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other's whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in the *Slater Case* (*supra*) the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road, but when a variation, or, in other words, when a special time table is made out for two trains by which they are to run, it is the duty of the master not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered and by which the trains are run shall not

necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary and is the duty of the master. When the train dispatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his, the master's, particular work.

In this case it appears that the train dispatcher had his office at Hornellsville for the whole division, and that while he used the name of the division superintendent in giving orders for the movement of trains, yet by the rules they were essentially his orders and signed with his initials in addition to those of the superintendent. It is not claimed that the division superintendent was even bound to know about these movements or special orders. There were three dispatchers at Hornellsville, but there was only one man at a time on duty, and his duty was for eight hours, and while on duty, by a rule of the company, no order could be issued by any other dispatcher. In this way provision was made for full knowledge by each dispatcher of everything going on on his division as to the movement of trains during the time when he was on duty. It is said the accident resulted from a disobedience of these rules, in that the dispatcher, who was about to relinquish his post, sent, at the request of his successor and in his name, the order to the east-bound train at Salamanca, and the successor, forgetting the transmission of such order at his request by the preceding dispatcher, gave the order to the train at Carrollton and bound west, which caused it to move forward and encounter the other train.

If the successor of the train dispatcher, instead of asking the one who was just off duty to send the order to the Salamanca train, had sent it himself, as the rule required, all that can be said is that there might have been more probability of his remembering it, but it cannot be said that his failure to obey the rule in such case was the cause of the accident. The same want of memory might have existed in either case. I do

not, however, lay any weight upon this fact, because, whether the train dispatcher did or did not obey a rule of the defendant, he was acting when the orders were given on this subject as the master and was discharging the master's duties, and if he negligently performed them the master must be held liable therefor. We do not say this duty went further than to use reasonable care, measured by the gravity of the interests at stake, to give originally correct orders. If they were correct, as originally given, and subsequently, through the negligence of some employee, they were incorrectly interpreted, or copied, or mistakenly repeated, or delivered to the wrong person, in these and in many other supposable cases there might, perhaps, be reason for the application of the doctrine as to negligence of a co-employee. It is not so as the case appears here.

In the *Flike Case* (*supra*) the accident happened because of the absence of a third brakeman on a train sent out from East Albany. The company had provided a man at that station called a head conductor whose duty it was to make up the trains, and hire and station the brakemen, and on account of one of the brakemen oversleeping himself the train went out without a sufficient number of brakemen. The court held the company had not discharged its duty to send out only a properly equipped train when it provided a head conductor and made rules for his presence there and gave to him a superintendence over the trains. The defendant owed a duty to the employees to send out only such a train, and that duty was not complied with by adopting rules governing such a case. It is also the duty of the company to use care in the furnishing of proper cars and machinery, but the duty is not performed by adopting a rule providing for proper inspection and in furnishing proper persons to perform such inspection, so long as they negligently omit to inspect. Proper inspection of the equipment and machinery of a train is itself part of the duty of the company. (*Bailey v. Rome, etc., R. R. Co.*, 139 N. Y. 302.)

These cases make it plain that whenever the act is that of the master or the duty to be performed is particularly his

duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master.

Nor is the holding that a train dispatcher in the dispatch of trains performs for the master a duty which it owes as such, a new departure in the branch of the law under discussion. While the cases cited below do not necessarily proceed upon that basis, yet it is plain that it was in all of them regarded as an indisputable proposition so far as a train dispatcher acted in ordering the movement of trains. In *Slater v. Jewett* (*supra*) it was assumed that the order of the train dispatcher was the act of the master, but it was held that the order was in fact correct and the injury happened from a negligent performance of duty by subordinate servants who were co-employees of plaintiff's intestate (85 N. Y. at pages 66, 70 and 71). The same holds true in the case of *Sheehan v. R. R. Co.* (91 N. Y. 332 at 337), and Judge DANFORTH there says that no servant takes the risk of an injury by the very act of the master himself. In *Dana v. R. R. Co.* (92 N. Y. 639) a judgment of non-suit in an action brought to recover damages for an injury received in the same accident in which Sheehan (91 N. Y. *supra*) was injured, was reversed in this court, and upon the same reasoning employed in the *Sheehan* case. And in *Sutherland v. The Troy & Boston R. R. Co.* (125 N. Y. 737, more fully in 35 N. Y. St. Repr. 853) this court assumes in the opinion there delivered that if the accident occurred from the omission of the train dispatcher at Troy to exercise proper care to notify the train, a case was made out on the question of defendant's negligence.

I think this is a fair and wholesome rule, fair to the master, while at the same time affording some protection to the employee. The defendant ought not to escape liability for negligently issuing as master and in the course of the performance of its duty as such to its employees, an improper order, and whether it has done so should be submitted to the jury.

I have looked at the various cases cited by the learned

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counsel for the defendant, and I have found none in this court which conflicts with these views. It is not necessary to cite each one, and criticise it in detail. It is sufficient to say they do not conflict with our decision in the case at bar.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except GRAY, J., not voting.

Judgment reversed.

THE PHOENIX BRIDGE COMPANY, Appellant, v. THE KEYSTONE
BRIDGE COMPANY et al., Respondents.

Plaintiff's complaint alleged in substance the formation of an association by plaintiff and the defendants, manufacturers engaged in the same business, under an agreement which provided that the members were to pay into a common fund a certain sum per pound on all their manufactures, to form a guaranty fund and for other purposes; the share of each party in said fund to be forfeited in case of his expulsion, as provided for; that plaintiff had performed the agreement on his part, but that the association had, in violation of the agreement and without giving him a hearing, found him in default in making payments to said fund, and threatened to expel him. The relief sought was that defendants be restrained from interfering with plaintiff's rights in the association, and from forfeiting its interests in the guaranty fund, etc. The answer denied the alleged unlawful actions on the part of the association, and the evidence was upon the issues so made. Both parties conceded on the trial that the agreement was illegal, because it was a combination to enhance prices, but it did not appear that plaintiff at any time during the trial repudiated or disaffirmed it or claimed to recover back the money paid because of its illegality. *Held*, that the refusal of the trial court to grant plaintiff any relief so far as this action was concerned, because it was proceeding in affirmance, and not in repudiation of the contract, was proper.

(Argued April 25, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 17, 1893, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Special Term.

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This action was brought by the plaintiff against certain individuals and corporations with whom it had formed an association, called the American Bridge Manufacturers' Association, for the purpose of having a resolution of the association assessing the plaintiff the sum of \$33,202.78, adjudged unlawful and void, and for the further purpose of having the court determine what amount, if any, was due as between the plaintiff and the association, and to restrain the expulsion of plaintiff from the association, or the enforcement against it of the penalties in the association agreement contained.

The provisions of said agreement and the facts, so far as material, are stated in the opinion.

Delos McCurdy for appellant. The plaintiff's action is in disaffirmance of the illegal agreement under which defendants claim the right to retain and convert to their own use money concededly belonging to plaintiff. The illegal agreement is a continuing one and executory in character. To allow the defendants to retain this money upon the sole ground that the plaintiff was a party to the illegal agreement under which defendants claim the right to retain it, would be an absurd violation of the spirit and policy of the law. (2 Comyn on Cont. 109, 110; *Sykes v. Beadon*, L. R. [11 Ch. D.] 170-197; *Williams v. Bayley*, L. R. [1 H. L.] 200; *Ex parte Pyke*, L. R. [8 Ch. D.] 754; *Davies v. L., etc., Ins. Co.*, Id. 469-477; *U. Ins. Co. v. Kip*, 8 Cow. 20-24; *Vischer v. Yates*, 11 Johns. 29, 30; *Yates v. Foote*, 12 id. 13; *Morgan v. Groff*, 4 Barb. 524; *Merritt v. Millard*, 4 Keyes, 208; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbes*, 17 How. [U. S.] 232-236; *Thomas v. City of Richmond*, 12 Wall. 349; *S. Co. v. Knowlton*, 103 U. S. 49-61; *Block v. Darling*, 140 id. 234-239; *W. U. Tel. Co. v. U. P. R. Co.*, 1 McCrary, 562, 563; *Brooks v. Martin*, 2 Wall. 70; *P. Bank v. U. Bank*, 16 id. —.) The learned trial judge erred in holding that because plaintiff was a party to the illegal agreement the door of a court of equity was closed against plaintiff, and that it had no right to enter there.

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(2 Pom. Eq. Juris. §§ 940, 941, 942; 1 Story's Eq. Juris. §§ 298, 300, 301, 304.) Even if the illegal transaction had been consummated and the proceeds in the hands of defendants, courts will not refuse to deal with the funds as between the parties, on the ground that the fund was acquired under an illegal agreement. (*W. U. Tel. Co. v. U. P. R. Co.*, 1 McCrary, 560, 563; *Brooks v. Martin*, 2 Wall. 70; *McBlair v. Gibbes*, 17 How. [U. S.] 232-236; *Armstrong v. Toler*, 11 Wheat. 258; *Sharp v. Taylor*, 2 Phillips' Ch. 801; *Tenant v. Elliott*, 1 Bos. & Pull. 3; *Farmer v. Russell*, Id. 296; *Lestapies v. Ingraham*, 5 Penn. St. 71.)

John E. Parsons for respondent. The agreement having been held, at the request of the plaintiff, to be against public policy, its purpose having been to prevent competition and to increase prices beyond market rates, equity will not interfere to adjust controversies between the parties. (*Gray v. O. B. Co.*, 59 Hun, 387; *Leonard v. Poole*, 114 N. Y. 371; *Materne v. Horwitz*, 101 id. 469; *Haynes v. Rudd*, 85 id. 251; *Arnot v. P. C. Co.*, 68 id. 558; *Knowlton v. C. & E. S. Co.*, 57 id. 518; *S. Co. v. Knowlton*, 103 U. S. 49, 58; *Parkersburg v. Brown*, 106 id. 487, 503; *Thomas v. City of Richmond*, 12 Wall. 349, 356; *Woolsworth v. Bennett*, 43 N. Y. 273.) It is only where the public interest will be promoted that equity interferes. Even then it stops where the public interest ceases. It declines to go one step in the interest of individual wrongdoers. (Story's Eq. Juris. § 298; *St. John v. St. John*, 11 Ves. 534, 1805; *Hatch v. Hatch*, 9 id. 297, 1804; *Madison v. Sharp*, 4 Cald. [Tenn.] 275, 1867; *Breathwit v. Rogers*, 32 Ark. 758, 1878; *Cox v. Donnelly*, 34 id. 762, 1879; *Leonard v. Poole*, 114 N. Y. 371; *Materns v. Horwitz*, 101 id. 469; *Arnot v. P. C. Co.*, 68 id. 558; *Knowlton v. C. E. S. Co.*, 57 id. 518; *Thomas v. City of Richmond*, 12 Wall. 349; *Woolsworth v. Bennett*, 43 N. Y. 273.)

PECKHAM, J. The parties to this action, excepting the individual defendant Eckert, entered into an agreement between

themselves by which they formed what they termed the "American Bridge Manufacturers Association," which had for its object the promotion of harmony among the bridge manufacturers of America and the carrying out of the provisions of the agreement then entered into. The agreement provided that each of the parties should pay monthly into a common fund a certain amount per pound on all iron work made and sold by them respectively during the previous calendar month, with exceptions therein particularly stated. The payments made by the parties were to form a guarantee fund until its total amount should be \$260,000. First payments were made in cash by the parties in proportions specified in the agreement, the proportion of the plaintiff being 16 per cent of a total of \$52,000. After the guarantee fund had reached the above-named amount the surplus assets were to be distributed among the members each month after deducting expenses and in proportions to be arrived at in a manner pointed out in the agreement.

Provision was made for referring disputes and other questions arising from carrying out the agreement, to a commissioner, who was to be appointed in a stated manner and who was to have power to hear and decide such matters as were under the agreement referred to him, with the power to any party to appeal to the executive committee and then to the association as a body and obtain from it a decision which would be final and binding.

Provision was also made in the agreement for the voluntary withdrawal of any party from the association upon notice, and if notice of such intended withdrawal were received and the consent of a majority of the members of the association obtained, the withdrawal became absolute at a stated time thereafter. Upon such withdrawal the party withdrawing took his proportion of the guarantee fund, the amount of such proportion being arrived at in a certain manner specified. If a party were to withdraw without the proper consent, then he forfeited one-fifth of his share in the guarantee fund, while if he were expelled under certain conditions the party would

forfeit all his right to the guarantee fund. The individual defendant Eckert was made the commissioner as provided for in the agreement. The association was formed in April, 1887, and under the provisions of the agreement the parties to it paid their monthly dues for some time.

Disputes subsequently arose between them, and to such an extent were their differences carried that the plaintiff commenced this action in January, 1890.

The complaint alleges the execution of the agreement between the parties and states that the plaintiff has ever since such time fully performed and kept all the covenants and provisions thereof. It is then alleged that the plaintiff had a contract for manufacturing certain iron work and setting it up for the elevated railroad in Brooklyn, and that by the true meaning and construction of the agreement the plaintiff was exempt from the payment to the association of any percentage on the amount of the iron manufactured and sold under that contract with the railroad. In substance it was shown by the further allegations of the complaint that this claim was not allowed by the association and that the commissioner and the association itself had improperly and in violation of the provisions of the agreement undertaken to determine that the plaintiff owed the association an amount of percentage on this iron in question of over \$30,000. That in arriving at this determination the association had failed and refused to give plaintiff an opportunity to be heard, and that the proceedings of the defendants in refusing the plaintiff's claim for exemption were had in pursuance of an unlawful undertaking between them by which they were to compel plaintiff to pay these dues, although they were not properly chargeable to plaintiff under the terms of the agreement, and that in the event of the plaintiff's refusal to pay the same it should be expelled and its share in the guarantee fund forfeited. The plaintiff desired to have the question of its liability to pay the dues to the association, determined by some properly constituted tribunal after a full and proper hearing had been afforded the plaintiff.

The amount of the guarantee fund was at the commencement of the action about \$250,000, and plaintiff's interest therein about \$40,000. Unless the dues declared to be payable to the association were paid within ten days from the time of notice so to do, the defendants threatened to expel the plaintiff from the association without legal cause and to declare all its rights in the guarantee fund forfeited and to divide up such fund among themselves as members of such association. The plaintiff had given notice of withdrawal from the association in accordance with the provisions of the agreement, but the membership would not terminate under its provisions until a year from the notice of withdrawal, which period had not elapsed at the time of the commencement of this action. There were some other allegations in the complaint which upon the question discussed it is not important to notice. The plaintiff asked in its prayer for relief that the resolutions and determinations of the association upon the assessment of the dues payable to it from the plaintiff should be decreed to be unlawful, and that the court should determine what if any amount was due the association from the plaintiff, and what amount from the association to the plaintiff, and that defendants should be enjoined from enforcing any penalties against plaintiff and from interfering with its rights in the association and from forfeiting its rights in the guarantee fund and from distributing the same. The complaint also prayed for a temporary injunction restraining defendants as above mentioned. The answers of the various defendants, while admitting the execution of the agreement and the formation of the association under it, and the payment of the monthly dues and the existence and extent of the guarantee fund, denied that there had been any improper act on the part of the defendants or the association in regard to the plaintiff, and alleged that it had been regularly and fully heard in regard to its claim for exemption, and a proper and regular decision had been rendered by the commissioner and the association, and that it was in accordance with the provisions of the agreement. They also denied any unlawful or improper agreement in regard to

expelling the plaintiff or the forfeiting or division of the fund in question.

Upon these pleadings the parties went to trial. Certainly, up to the time of the trial, there is nothing appearing upon the record which shows any attempt at a disaffirmance or repudiation of the agreement under which the association was formed. I fail to find any proof that the plaintiff repudiated or disaffirmed the agreement at any time during the trial. No part of the evidence is returned on this appeal, and we can only form a surmise as to its character by looking at the various requests to find facts made by the different parties and their proposed conclusions of law therefrom. The inference from reading these requests is that on the trial evidence was given upon the issues made by the pleadings, and upon such evidence the plaintiff asked findings which showed that it had not had an opportunity to be heard before the commissioner as provided for in the agreement, and that the association had not given plaintiff any such opportunity, and had made no valid decision upon the matters in dispute between plaintiff and such association. The mere fact that plaintiff and defendants both conceded on the trial that the agreement was illegal, because it was a combination to enhance prices, is very far from showing, or even tending to show, that the plaintiff disaffirmed its provisions as between itself and the other parties thereto, or that it based its claim to relief because of the illegality of the agreement, and not because of the defendants' violation of its provisions by reason of which the rights of the plaintiff were jeopardized.

The conceded illegality of the contract is entirely consistent with the claim made by the plaintiff that the defendants had been guilty of a violation of the provisions thereof in the particulars alleged in the complaint. Whether in such a case courts would grant relief is another question. What I assert is that the plaintiff does not show a disaffirmance of this agreement and a demand to recover back its money on that ground when it serves such a complaint as the one in this action and then on the trial simply concedes that the agreement is illegal

as being a combination to enhance prices. Notwithstanding such concession it is plain that evidence was given on the subject set forth in the complaint and in regard to the actions of the defendants in refusing a proper hearing and in making an alleged improper decision, and it is plain that a judgment was sought for the relief demanded in the complaint, upon the ground that plaintiff had proved a violation by the defendants of the provisions regarding hearings as alleged by plaintiff in its complaint. In truth it is difficult if not impossible to reach any other opinion from a perusal of the record.

The refusal of the trial court to grant plaintiff any relief because, so far as this action is concerned, it was proceeding in affirmance and not in repudiation of the agreement was, therefore, correct.

There was a proposed conclusion of law on the part of the plaintiff which asserted that the agreement was void and that as such it could furnish no legal ground to justify a forfeiture of plaintiff's rights or property to the use or for the benefit of the other members of the association formed by the agreement. This proposition does not show the plaintiff as disaffirming the agreement. It only shows that among various claims the plaintiff denied the defendants' right to forfeit the plaintiff's property and that it based such denial on the ground that the agreement was illegal. The other findings requested by plaintiff show conclusively that its ground for relief was the alleged violation of the agreement by the defendants.

The ground stated in the complaint is totally at war with the one now argued by the plaintiff's counsel, and we cannot see that the latter ground was even taken on the trial. In affirming this judgment we do not intend to pass upon the question of the alleged right of plaintiff to disaffirm and repudiate the obligations of this so-called executory or continuous agreement, and in a proper action to recover back the moneys it has paid in under it. That question can better be determined after it shall have been presented in an action commenced upon that view of the law, and when all parties will come prepared to try that single question on proper pleadings and in an

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appropriate manner. We can only say that in this record it appears that the plaintiff did not proceed upon any principle of a disaffirmance of the agreement, and the relief sought was not appropriate to that theory of its cause of action.

The judgment should be affirmed, with costs, but to avoid any plea of *res adjudicata* by reason of this judgment, it should be affirmed without prejudice to the commencement of an action by plaintiff, if it be so advised, to recover back moneys it has paid to the association, on the ground that the agreement forming it was illegal.

All concur.

Judgment accordingly.

CHARLES E. STOKES, Appellant, v. HENRY WESTON et al.,
Impleaded, etc., Respondents.

The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result.

So, also, the law favors the vesting of estates, and in case a will contains apt words to dispose of the testator's entire estate that construction will be given to it.

The will of S. gave to his wife the use of all his property for life, the remainder to his three children, two sons who were unmarried, and a daughter who was married and had two children. The will then provided that in case of the death of the sons, or either of them, without issue then living, the share of the one so dying should be divided equally between the two grandchildren. In an action for partition of lands of which the testator died seized, and for a construction of the will, held, that the death referred to was that of a son during the lifetime of the testator, and as they both survived him, they, with their sister, took the entire estate, subject to the life estate of the widow.

Mead v. Maben (131 N. Y. 255), distinguished.

Stokes v. Weston (69 Hun, 608), reversed.

(Argued December 15, 1893; decided January 16, 1894; * Re-argument ordered February 6, 1894; re-argued April 18, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

* See *Mem. of decision*, 141 N. Y. 558.

142	433
144	74
144	299
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147	355
142	433
154	286
154	644
142	433
158	328
142	433
166	408
166	539
142	433
168	179
142	433
170	276

made June 23, 1893, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John D. Teller for appellant. The words of a will are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected, and that other sense can be ascertained. (*Vernon v. Vernon*, 53 N. Y. 351; *Fowler v. Ingersoll*, 127 id. 478; *Smith v. Floyd*, 140 id. 337.) The expression "but in case of the death of my sons," etc., indicates that the testator had in mind the death of his sons prior to his own decease. (*Edwards v. Edwards*, 15 Beav. 357; *Vanderzee v. Slingerland*, 103 N. Y. 54.) Where a testamentary gift is made to one person, and in case of his death without issue, then to others, the death referred to will be construed to be one in the lifetime of the testator, unless the scheme of the will and the context show a different intention. (*Nelson v. Russell*, 135 N. Y. 127; *Vanderzee v. Slingerland*, 103 id. 47; *Embury v. Sheldon*, 68 id. 227; *Kelly v. Kelly*, 61 id. 47; *Livingstone v. Greene*, 52 id. 118; *Moore v. Lyons*, 25 Wend. 118; *Quackenbos v. Kingsland*, 102 N. Y. 123.) The estate to the testator's sons being given in clear and decisive terms, should not be allowed to be taken away by subsequent words which are not as clear and decisive as those giving the estate. (*Roseboom v. Roseboom*, 81 N. Y. 356; *Campbell v. Beaumont*, 91 id. 464; *Byrnes v. Stilwell*, 103 id. 453; *Embury v. Sheldon*, 68 id. 236; *Quinn v. Hardenbrook*, 54 id. 86.) A valid executory devise cannot be limited upon an absolute fee, which includes the power to dispose of the property. (*Campbell v. Beaumont*, 91 N. Y. 464; *Smith v. Van Ostrand*, 64 id. 278; *Tyson v. Blake*, 22 id. 558; 2 Jarman on Wills [6th ed.], 854.) Authority for this action is to be found in section 1533 of the Code of Civil Procedure, which provides that when two or more persons hold as joint tenants or as tenants in common, a

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vested remainder or reversion, any one or more of them may maintain an action for partition, and a sale may be made with the consent of the life tenant. (*Stief v. Hart*, 1 N. Y. 20; *Riggs v. Cragg*, 80 id. 479; *Livingstone v. Greene*, 52 id. 118; *Vanderzee v. Slingerland*, 103 id. 47.)

Frank S. Coburn for respondent. The intention of the testator being plainly expressed and the wording of the will free from ambiguity, the general rule of construction should not apply. (*Vanderzee v. Slingerland*, 103 N. Y. 47; *Matter of Van Zandt*, 105 id. 89; *Washborn v. Cope*, 22 N. Y. Supp. 241; *In re Denton*, 23 N. E. Rep. 482; *Nellis v. Nellis*, 99 N. Y. 512; *Burt v. Southwick*, 70 id. 581; *Mead v. Maben*, 131 id. 261; *Britton v. Thornton*, 112 U. S. 562.) In the case at bar, the first devisee taking a life estate, the death referred to must be deemed the death of the sons at any time. (*Mullarky v. Sullivan*, 136 N. Y. 227; *Fowler v. Ingersoll*, 127 id. 472; *Mead v. Maben*, 131 id. 261.)

BARTLETT, J. This is an action for partition and seeks, as incidental relief, a construction of the will of the late Samuel Stokes, of Auburn, Cayuga county, who died on the 24th of October, 1889. The testator left him surviving as legatees and devisees under his will his two sons, Charles E. Stokes and Alfred Stokes; a daughter, Clara McGee; a widow, Eliza Stokes, and two infant grandchildren, Henry Weston and Porter Weston, the children of his daughter Clara McGee. At the time of the testator's death his two sons were unmarried. The material portions of the will read as follows, viz.:

"*First.* I give, bequeath and devise to my wife, Eliza Stokes, in case she survives me, the use of all my property for and during the term of her natural life, which is in lieu of her dower and her set-off, and distributive share of my estate.

"*Second.* I give, bequeath and devise to my children, Alfred Stokes, Charles E. Stokes and Clara McGee, the rest, residue and remainder of my property in equal proportions, but in case of the death of my sons, Alfred and Charles E., or

either of them, without issue living at the time of his decease, then the share of*the one so dying without issue shall be divided equally between my grandchildren, Henry Weston and Porter Weston." The Special Term held that the second subdivision of the will referred to the event of the death of said sons, or either of them, in the lifetime of the testator, and as they survived their father, they, with their sister, Clara McGee, were the owners in equal shares of the entire estate of the testator, real and personal, subject to the life estate of the widow. The General Term reversed the judgment, holding that the sons took a mere contingent estate in fee, liable to be reduced to a life estate, as to each of them, in the event of his dying without lawful issue living at the time of his death, whether such death occurred before or after the decease of the testator. We are of opinion that the judgment of the General Term should be reversed and that of the Special Term affirmed. In the *Matter of the N. Y., L. & W. R. Co.* (105 N. Y. 92) Judge RAPALLO said: "It may be regarded as a settled rule of construction that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first-named devisee during the lifetime of the testator, and that if such devisee survives the testator he takes an absolute fee; that the words of contingency do not create a remainder over to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator. The reason assigned for this construction has been that, as death is a certain event and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period, and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that,

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in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first-named devisee to an estate for life; for his death at some time is certain, and the words of inheritance attached to the devise to him would in every case be inoperative." The rule and its reasons thus stated have been recognized by the courts of England and this state for many years. In case of *Doe, Lessee of Lifford, v. Sparrow* (13 East, 359) Lord ELLENBOROUGH laid down the rule after elaborate reasoning, and in *Gee v. The Mayor, &c., of Manchester* (17 Adol. & Ell. 737) Lord CAMPBELL further discussed the rule and approved the reasoning of Lord ELLENBOROUGH in the case cited. (See, also, *Clayton v. Lowe*, 5 Barn. & Ald. 636; *Woodburne v. Woodburne*, 23 L. J. Ch. 336; *Moore v. Lyons*, 25 Wend. 118; *Livingston v. Greene*, 52 N. Y. 118; *Kelly v. Kelly*, 61 id. 47; *Embury v. Sheldon*, 68 id. 227; *Vanderzee v. Slingerland*, 103 id. 47; *Nelson v. Russell*, 135 id. 137.)

An examination of the cases in this court where the rule has not been applied will disclose the fact that there was some language of the testator indicating a different intention. Such a case was *Mead v. Maben* (131 N. Y. 255). Judge GRAY expressly rested the decision of the court, which refused to apply the rule in that case, on the special language of the testator. In the case at bar, the judge at Special Term was of opinion that the "natural import" of the language of the will referred to a death either before or after the death of the testator, but felt constrained by the rule under discussion to a different conclusion. If the will was susceptible of such a construction as the learned trial judge supposed possible, then the rule in question had no application, his decision was erroneous and the judgment of the General Term would have to be sustained. We are, however, of the opinion that there is no language of the testator indicating that he referred to the death of his sons after his own decease. The rule referred to, therefore, applies to this case and leads to a reversal.

We also hold that a fair interpretation of the language of the second subdivision of this will leads to the same result independently of this rule of construction. The will is brief and on its face manifests a clear, natural and well-considered scheme. The task the testator had in hand was to provide for his widow, two unmarried sons, and a married daughter having two children. In the first subdivision of the will he gives his wife the use of his entire estate for her life. In the second subdivision of the will, by apt language, he vests his entire estate in his two sons and daughter in equal proportions, and goes on to say, "but in case of the death of my sons, Alfred and Charles E., or either of them, without issue living at the time of his decease, then the share of the one so dying without issue shall be divided equally between my grandchildren, Henry Weston and Porter Weston." It should be remembered that the testator was, in the clause under construction, seeking to dispose of his entire estate, and having vested the title in his three children, ordinary prudence required him to guard against intestacy as to the share of a son who might die without issue before the will should take effect, as the statute protected the issue of children dying in the testator's lifetime. (2 R. S. 66, § 52; 4 R. S. [8th edition] p. 2549, § 52.) The testator thus indicated his clear intention to divide his estate equally among his children if they should survive him, but if either son died without issue before the will took effect, his share should go to the grandchildren who were males in preference to his surviving children, one of whom was a daughter. This construction gives full force and effect to all the language of the will and does equal justice to the three children of the testator. On the other hand, the construction contended for by the guardian *ad litem* of the infant grandchildren, the respondents, ignores the plain provisions of the instrument, and if sustained, would lead to an unjust and unnatural will. It would give to the daughter absolutely one-third of the estate, real and personal, while each son, one forty-two and the other forty years old at testator's death, would take a mere contingent estate in fee in one-third of the estate, liable to be

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reduced to a life estate at any time by his death without issue. Such an estate is of little value either to sell or to mortgage, and while it was perfectly competent for the testator to have thus discriminated between his children, we hold that such intent must be made manifest by plain and unmistakable language, which is not to be found in the subdivision of the will we are now construing.

The law favors equality among children in the distribution of estates, and in cases of doubtful construction it selects that which leads to such a result. Furthermore, the law favors the vesting of estates; in the will before us there are apt words bequeathing and devising the entire estate in equal proportions to the three children of the testator, and our construction of the language that follows gives full force and effect to these words of bequest and devise. (*Embury v. Sheldon*, 68 N. Y. 236; *Roseboom v. Roseboom*, 81 id. 356; *Campbell v. Beaumont*, 91 id. 464; *Byrnes v. Stilwell*, 103 id. 453.) We are satisfied this construction of the will is in strict accordance with the testator's intentions, and is perfectly just to his surviving children.

The judgment of the General Term is reversed and the judgment of the Special Term affirmed, with costs to the appellant in all the courts.

All concur, except GRAY, J., dissenting.

Judgment accordingly.

THOMAS FLYNN, Respondent, v. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Appellant.

As at the time of the ratification of the judiciary article of the State Constitution, which provides that the Superior Court of New York is continued "with the powers and jurisdiction" it then had (§ 12, art. 6), said court had jurisdiction of an action by a resident of the state, although not a resident of the city, against a foreign corporation to recover damages for personal injuries caused by negligence (Code Pro. § 427), said court has now jurisdiction of such an action, notwithstanding the provision of the Code of Civil Procedure (sub. 7,

§ 263 in reference to the jurisdiction of superior city courts. Any legislation attempting to limit the jurisdiction is unconstitutional.

One inviting another upon his premises does not thereby become the absolute insurer of the safety of the other except as against his own negligence.

The owner of premises occupied for business purposes, as a general rule, is simply required to use reasonable prudence and care to keep his property in such a condition that those who go thereon shall not be unreasonably and unnecessarily exposed to danger.

Plaintiff, a grain shoveler, was employed on board a grain elevator lying alongside one of defendant's piers in transferring grain to a car standing on a track. Between that track and the elevator was another track upon which empty cars were standing. Between two of these cars a space was left through which those employed in loading said car passed to and fro. While plaintiff was passing through this space the empty cars were suddenly forced together and he was injured. In an action to recover damages, the court charged in substance that the rule of law is, if a person invites another to come upon his premises, which he controls, "he is responsible for any injury which ensues * * * unless the fact is that the person is negligent himself." *Held*, error.

(Argued April 20, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Holmes for appellant. The court below had no jurisdiction either of the person of the defendant or the subject of the action. (Code Civ. Pro. § 263.) In order to recover the plaintiff must show that defendant owed him a duty, the neglect of which caused the injury, and this proof must be by direct evidence, or by proof of facts from which the inference of negligence can be legitimately drawn by the jury. (*McCaffrey v. R. R. Co.*, 47 Hun, 404; *Cotton v. Wood*, 8 C. B. [N. S.] 568.) There was contributory negligence on the part of the plaintiff sufficient as matter of law to

defeat a recovery. (*Grippen v. R. R. Co.*, 40 N. Y. 44; *Heaney v. L. I. R. R. Co.*, 112 id. 126.) There was no proof of proper caution by the plaintiff, and his proofs disclosed want of proper care. (*Tolman v. R. R. Co.*, 98 N. Y. 202; *Weston v. City of Troy*, 139 id. 282.)

Edmund R. Terry for respondent. The court below had jurisdiction. (*Flynn v. C. R. R. Co.*, 27 Abb. [N. C.] 31.) The plaintiff cannot be considered negligent in relying upon the implied agreement of the defendant to guard him from injury, even though it once before conducted itself in a contrary manner. (*Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 389, 390; *Roll v. N. C. R. Co.*, 15 Hun, 502; 80 N. Y. 647; *Omingier v. N. Y. C. & H. R. R. R. Co.*, 6 T. & C. 500; *Ernst v. H. R. R. R. Co.*, 35 N. Y. 28; 39 id. 61; *St. Peter v. Denison*, 58 id. 416; *Weber v. N. Y. C. & H. R. R. R. Co.*, 58 id. 451; *Gordon v. G. S. R. R. Co.*, 40 Barb. 550.) The defendant invited the plaintiff to use this passage between the cars, and is, therefore, answerable for anything in the nature of a trap that existed therein, by reason of which the plaintiff while using ordinary care was injured. (*Beck v. Carter*, 68 N. Y. 292; *Nicholson v. E. R. R. Co.*, 41 id. 537; *Larmore v. C. P. I. Co.*, 101 id. 395.) There was no common master of the plaintiff and the other men employed and at work on the pier, and though with regard to the place of service, they were neighbors, they were not co-servants. Each was, therefore, entitled to protection. (*Sullivan v. T. R. R. Co.*, 112 N. Y. 648; *Stevenson v. A. M. S. S. Co.*, 57 id. 108.) The defendant was bound to see that its affairs necessary to be carried on, on and about its pier and cars, were so conducted that other persons should not receive injury. (*Althorf v. Wolfe*, 22 N. Y. 365; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 64 id. 538; *Grippen v. N. Y. C. R. R. Co.*, 40 id. 42; *Smith v. B. & N. A. R. M. S. P. Co.*, 86 id. 413; *Bunnell v. Stern*, 122 id. 543.) The pier and cars were under the control of the defendant, and the accident was one that would not happen

in the ordinary course of business, if reasonable care was used by the defendant, and, therefore, in absence of explanation, it affords presumptive evidence of want of care on the part of the defendant. (*Cosulich v. S. O. Co.*, 122 N. Y. 127; *Breen v. N. Y. C. & H. R. R. Co.*, 109 id. 300.) The defendant is chargeable also with knowledge of the danger to human life from the movement of its cars at this place. (*Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 292; *Dist. Nicholson v. E. R. Co.*, 41 id. 525.) The liability of the defendant for the damages sustained by the plaintiff, owing to injuries incurred through its negligence, does not depend necessarily upon any contractual relation between them directly. (*Thomas v. Winchester*, 6 N. Y. 410; *Coughtry v. G. W. Co.*, 56 id. 127; *Devlin v. Smith*, 89 id. 477, 478.) The contributory negligence of persons unconnected with the plaintiff cannot be imputed to the plaintiff as contributory negligence. (*Webster v. H. R. R. Co.*, 38 N. Y. 262; *Sheridan v. B. & N. R. R. Co.*, 36 id. 39.) If the plaintiff was injured through the negligence of the defendant in failing to provide and keep this passage safe and secure for the plaintiff's use, the fact that he was injured through the negligence of the men employed in moving the asphaltum cars, does not relieve the defendant from this responsibility. (*Hardy v. City of Brooklyn*, 90 N. Y. 441; *Pollett v. Long*, 56 id. 206; *Pastene v. Adams*, 49 Cal. 87; *Lowery v. M. R. Co.*, 99 N. Y. 163; *Slater v. Mersereau*, 64 id. 146; *Barrett v. T. A. R. R. Co.*, 45 id. 631.)

BARTLETT, J. The plaintiff sues to recover damages for alleged personal injuries. The case was tried in the Superior Court of the City of New York, a jury finding a verdict of \$2,500 for the plaintiff. The judgment entered upon the verdict was affirmed by the General Term. A preliminary point was taken at the trial and argued on this appeal challenging the jurisdiction of the Superior Court of the City of New York either of the defendant or the subject of the action. It is claimed that, as the plaintiff at the date of com-

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menacing the action was a resident of the city of Brooklyn, the defendant a foreign corporation, and the cause of action one that accrued in New Jersey, the court under section 263, subdivision 7 of the Code of Civil Procedure had no jurisdiction. This section deals with the jurisdiction of superior city courts. Subdivision 7 extends it "To an action by a resident of that city against a foreign corporation, either (1) to recover damages for the breach of a contract, express or implied, or the sum payable by the terms of a contract, express or implied, where the contract was made, executed or delivered within the state; or (2) where a warrant of attachment granted in the action has been actually levied within that city upon property of the corporation; or (3) where the summons is served by delivery of a copy thereof, within that city, to an officer of the corporation, as prescribed by law."

It is sufficient answer to this objection that the jurisdiction of the Superior Court of the City of New York is defined by article 6, section 12 of the Constitution of this state, which reads in part as follows: "The Superior Court of the city of New York" (and three other courts named) "are continued with the powers and jurisdiction they now severally have, and such further civil and criminal jurisdiction as may be conferred by law."

This article of the Constitution was ratified by the People in November, 1869, and took effect in 1870. At that time the Superior Court of the City of New York had jurisdiction in an action by a resident of this state for any cause of action against a corporation created by or under the laws of any other state, government or country. (Code of Procedure § 427.) Any legislation limiting this jurisdiction is unconstitutional.

This court in *Poppinger v. Yutte* (102 N. Y. 38) held subdivision 5 of section 263 of the Code of Civil Procedure unconstitutional as being in conflict with the provision of the Constitution already cited. We hold the Superior Court of the City of New York had jurisdiction of this action. We now come to the consideration of this appeal on the merits.

The plaintiff, a grain shoveler, at the time of his injury

was employed by the firm of Edward Annan & Co., on board of one of their grain elevators, engaged in transferring grain from a canal boat to the cars of the defendant's road. The elevator was made fast to one of defendant's piers in Jersey City, and the canal boat laid at the side of the elevator away from the pier, while the cars on which the grain was being loaded stood on a track of defendant's said piers. Between these cars and the side of the pier to which the elevator was secured was another track on which stood empty cars which were in the control of defendant, but with which plaintiff and his employers had nothing to do. In loading the grain it was necessary for plaintiff and others to pass frequently from the elevator to the cars being loaded, and for convenient passage a space of about six feet had been left between two of the cars standing on the intermediate track. While plaintiff, in the discharge of his duty, was passing through this space the cars were suddenly forced together and he was very seriously injured. This is an outline of the facts as alleged by plaintiff, and to some extent controverted by the defendant, and concerning which a large amount of evidence was submitted to the jury. As we are of opinion that there was legal error in the learned trial judge's charge to the jury which leads to the reversal of this judgment it is unnecessary to consider many of the questions discussed on the argument and in the briefs of counsel. The main question in this case is whether, upon the facts submitted to the jury, the defendant is liable. The court charged as to the rule of law governing this liability as follows: "The rule of law is that if a person invites another to come upon the former's premises, and premises which the former controls, he is responsible for any injury which ensues from the other person going upon those premises where he is invited. And it is so in this case." The defendant's counsel excepted to this part of the charge, and the court said: "I repeat that unless the fact is that the person is negligent himself." The effect of this charge was to practically instruct the jury that if one invites another upon his premises he becomes the absolute insurer of his safety unless the person invited is

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guilty of negligence. There is no such rule of law, and it is impossible to say that the jury were not misled by this part of the judge's charge. The general rule applicable to persons occupying real property for business purposes is that they must use reasonable prudence and care to keep their property in such a condition that those who go there shall not be unreasonably and unnecessarily exposed to danger. The measure of their duty is reasonable prudence and care. (*Larkin v. O'Neill*, 119 N. Y. 225; *Newell v. Bartlett*, 114 id. 399; *Hart v. Grennell*, 122 id. 374; *Ackert v. Lansing*, 59 id. 646.)

We regret the necessity for reversing this judgment, as this is a case peculiarly within the province of a jury to decide, and we express no opinion on the merits. If another trial is had it will be for the jury to determine the precise state of facts under which the plaintiff entered upon the pier of the defendant, and received the injuries of which he complains; and it will be the duty of the trial judge to instruct the jury as to the rules of law applicable to the facts as found.

The judgment and order appealed from are reversed, and new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

SARAH A. CARSON, Appellant, v. SIMON DESSAU, Respondent.

In an action for false imprisonment plaintiff's testimony was to the following effect: Having a valid claim against defendant she went to his place of business to collect it and asked payment of him. Defendant's father, D., who was a stranger to plaintiff, interposed and addressed her on the subject of the bill. She replied she was not addressing him, but the one who owed the bill. She again asked defendant to pay; he said nothing. Plaintiff then added, "Well, the only thing I can do is to state the case to the 'World' and see what they can do for me." Thereupon defendant called to D. and whispered to him. The latter directed a person in the office to go for a detective. An officer came and D. directed him to arrest plaintiff, charging her with blackmail, alleging she had come to extort money from him. This plaintiff denied, but she was arrested and taken to a station house where D. preferred a charge

against her of blackmail. She was confined over night, and the next day the charge was changed to that of disorderly conduct. She was fined, and on payment of the fine was discharged. Prior to this plaintiff had written to defendant: he came to her house with an officer and said to her if she "bothered him about any bill he would make it pretty hot for her." *Held*, that a jury might have found from the testimony that the act of D. was instigated by defendant, and so, that a non-suit was error.

(Argued May 1, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 5, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

This action was brought to recover damages from defendant and one David Dessau, who was joined as a party defendant, but has died since the action was commenced, for alleged false imprisonment.

The facts, so far as material, are stated in the opinion.

L. A. Gould for appellant. Plaintiff's arrest was unlawful and an outrage; all persons who connived at the arrest are liable in damages. (Penal Code, § 558; *People v. Wightman*, 104 N. Y. 601; *People v. Griffin*, 2 Barb. 247.) The proven facts are sufficient, *prima facie*, to establish respondent's liability for the unlawful arrest of appellant. (*People v. Tweed*, 5 Hun, 382; *Weidner v. Phillips*, 39 id. 1; *Mali v. Lord*, 39 N. Y. 381; 101 id. 617.) Plaintiff being non-suited, no affirmative findings could be made, and no judgment upon the merits could properly be rendered. (*Lugar v. Byrnes*, 21 N. Y. Supp. 753, 754; *Scofield v. Hernandez*, 47 N. Y. 313.)

Leon Lewin for respondent. The complaint was properly dismissed. (*Brown v. Chadsey*, 39 Barb. 253; *Müller v. Millegan*, 45 id. 30; *Dwight v. G. Ins. Co.*, 103 N. Y. 341; *Bailev v. N. Y. & H. R. R. Co.*, 59 id. 356.) The evidence against defendant is entirely circumstantial. (*Allen v. Allen*,

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101 N. Y. 659; *Pollock v. Pollock*, 71 id. 137.) The defendant is not responsible for an arrest caused by persons not in his employ. (*Mali v. Lord*, 39 N. Y. 381.) The judgment dismissing the complaint upon the merits was proper. (Code Civ. Pro. § 1209; *Knight v. Sackett*, 19 N. Y. Supp. 712.)

ANDREWS, Ch. J. We think the case should have been submitted to the jury upon the question whether the defendant acted in concert with David Dessau in procuring the arrest of the plaintiff and aided or abetted it. The complaint was dismissed on the conclusion of the evidence on behalf of the plaintiff, and, if unexplained, it justified an inference that the defendant was a party to the unlawful arrest the court should not have taken the case from the jury. Upon the uncontradicted proof the plaintiff had a valid claim against the defendant and went to his office to collect it. That the place where she went was the defendant's place of business was indicated by a sign with his name thereon. Finding the defendant there she addressed him, asking payment of the bill. He made no reply, but his father, David Dessau (since deceased), whom the plaintiff did not know and had never seen before, interposed and addressed her on the subject of the bill. The plaintiff said: "I am not addressing you; I am addressing the gentleman who owes me the bill," and then again speaking to the defendant said: "I hope you will pay me the gas bill and not put me to any trouble." The defendant remained mute, and the plaintiff then said: "Well, the only thing I can do is to state my case to the 'World' and see what they can do for me. I am too poor to lose that money." Thereupon, as the plaintiff testified, the defendant called to his father and whispered to him. The father said nothing and his lips did not move. On the conclusion of the whispering David Dessau directed a young man in the office to go for a detective, and turning to the plaintiff said: "Madam, be seated." An officer soon came and the father said to him: "I want you to arrest that woman." The officer said, "What for," and he replied, "For blackmail; she has come

to extort money from me and I don't owe her any money. I don't know her, she is a stranger." The plaintiff protested that she was not liable to arrest; that she made no claim against David Dessau, but that her claim was against the defendant. The officer said something about preferring a charge, and David Dessau said: "I prefer the charge of blackmail." The plaintiff was compelled to go with the officer and David Dessau to the station house, and there the latter charged her with blackmail. She was taken below to a cell and kept in the corridor till morning, when, on being brought before the justice, the charge was changed to that of disorderly conduct and she was fined \$10, which she paid and was thereupon discharged.

The arrest of the plaintiff was without warrant, on a charge of crime, when in fact, according to her testimony, no crime had been committed, and no reasonable ground for suspicion existed on the part of David Dessau, by whose immediate direction the arrest was made. He was guilty of false imprisonment whether or not the officer was liable. (*Holley v. Mix*, 3 Wend. 351, and cases cited; *Burns v. Erben*, 40 N. Y. 463.) The defendant did not by word participate in the direction given by David Dessau, unless the jury would have a right to infer from his relation to the transaction that the direction of David Dessau to have an officer brought immediately following the whispered communication was with his concurrence and advice. The defendant cannot be made liable on a suspicion merely of his concert with his father in procuring the alleged arrest. But can it be said that the evidence upon this point did not rise above the grade of conjecture to the dignity of proof? The jury had a right to take into consideration all the circumstances, as well those occurring at the immediate time and before, bearing upon and aiding in the interpretation of the defendant's conduct and participation. There is a fact of some significance ante-dating the day of the arrest. The plaintiff testified that a short time before that day and after the defendant had left the flat, she had written him and he came to see her with an officer, and during a conversation about the gas bill he said, "that if I bothered him

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about any bill he would make it pretty hot for me." A few days after she had the interview at the office. Considering this threat in connection with the defendant's conduct at the office; his remaining mute; his whispered communication; the order given by David Dessau immediately following; the absence of any protest on his part when it was a matter between himself and the plaintiff alone to which the interview related, we cannot say that unexplained the jury might not have found that the act of David Dessau was instigated by the defendant. We express no opinion as to the conclusion which should be reached by the jury. We hold merely that upon the evidence given the jury should have been allowed to pass upon the question.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed. _____

ELWOOD B. MINGAY, Appellant, v. MARY ESTELLE LACKEY,
Impleaded, etc., Respondent.

By an interlocutory judgment in an action for partition, which directed a sale of the premises, it was provided that the life estate of defendant M., a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of the sale "a gross sum in satisfaction of said tenancy by the curtesy, to be fixed * * * according to the principles of law applicable to annuities." After entry of said judgment and before a sale M. died. Thereafter, upon motion, the judgment was amended by striking out the provision in reference to said life estate. *Held*, no error; that the death of the life tenant terminated his interest; this rendered the execution of that part of the judgment directing a sale of that interest impossible, and the proceeds of sale could not equitably be charged with the supposed value of the life which had terminated; and that until a sale the proceedings were incomplete and the right of the life tenant to a share of the proceeds was conditional, not fixed and absolute.

Robinson v. Govers (188 N. Y. 425), distinguished.

Reported below, 74 Hun, 89.

(Submitted April 23, 1894; decided June 5, 1894.)

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APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which affirmed an order of Special Term.

This appeal is from an affirmance by the General Term of the second department of an order of the Special Term amending, upon the application of the defendant, Mary Estelle Lackey, an interlocutory judgment in the action entered April 8, 1893, by cancelling and striking therefrom a provision directing a sale of the interest of James B. Mingay, a tenant by the curtesy in the premises directed to be sold, and payment by the referee appointed to make the sale out of the proceeds of a gross sum in satisfaction of such interest, to be fixed by him "according to the principles of law applicable to annuities." The action was for partition. The plaintiff is the son of Mary L. Mingay, who died Sept. 8, 1892, seized of three parcels of land situated respectively in Westchester county, the city of New York and the city of Brooklyn, leaving surviving her her husband, James B. Mingay, and two children, the plaintiff and the defendant Mary Estelle Lackey. The plaintiff brought this action Nov. 16, 1892. It is alleged in the complaint that Mary L. Mingay died intestate, seized of the three parcels of land above mentioned, and leaving her husband and two children above named her only heirs at law surviving her; that the lands descended in equal shares to the plaintiff and the defendant Mary Estelle Lackey, subject to the tenancy by the curtesy of the husband; that subsequent to the death of Mary Louise Mingay, the defendant James B. Mingay assigned and conveyed his life interest to the plaintiff. The complaint prays partition of the premises according to the rights of the parties as alleged therein, or for a sale and division of the proceeds if actual partition cannot be made. The defendant Mary Estelle Lackey answered and put in issue the allegation of the complaint that the mother died intestate, and alleged that she made a will devising the whole property sought to be partitioned to the defendant Mary Estelle Lackey. This issue was brought to trial before a jury and resulted in a verdict for the plaintiff. Thereafter, upon

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due application, the Court at Special Term directed judgment to be entered in the action and an interlocutory judgment was thereupon entered. The judgment declared the rights and interests of the several parties as stated in the complaint, viz., that the plaintiff Elwood B. Mingay and the defendant Mary Estelle Lackey were each entitled to the undivided half of the premises in fee, subject to the life estate of James B. Mingay as tenant by the curtesy, which life estate had by transfer become vested in the plaintiff. It adjudged that an actual partition could not be made, and directed that the whole premises be sold by a referee named and that the "tenancy by the curtesy be included in the sale," and that the referee pay out of the proceeds of the sale "a gross sum in satisfaction of the said tenancy by the curtesy to be fixed by the said referee according to the principles of law applicable to annuities." The judgment also provided for a reference to take an account of rents and profits received by the defendant Mary Estelle Lackey, and made provision for costs and for an extra allowance to be fixed on a sale of the property, and contained other provisions not necessary now to be stated.

After the entry of the interlocutory judgment and before a sale or any further proceedings, and on the 27th of April, 1893, the said James B. Mingay died. Thereafter a motion was made in behalf of the defendant Mary Estelle Lackey to correct the interlocutory judgment by striking out the provisions for the sale of the estate by the curtesy and the payment of a gross sum in satisfaction thereof. The motion was granted, and from the order made thereon an appeal was taken to the General Term where the order was affirmed.

Sidney H. Stuart for appellant. The order is appealable. (Code Civ. Pro. § 190; *Moulton v. Cornish*, 138 N. Y. 133.) The interlocutory judgment must declare the right, share and interest of each party in the property so far as the same has been ascertained, and must determine the rights of the parties therein. (Code Civ. Pro. § 1546.) The judgment is complete so far as the rights of the parties are concerned. Noth-

ing remains to be done except a sale and distribution of the proceeds. The principles by which the rights of the parties are determined is established, and the steps necessary to reach the point at which final judgment may be awarded are directed to be taken. (*C. F. N. Bank v. Lynch*, 76 N. Y. 516; *Tilton v. Vail*, 117 id. 521; 21 Abb. [N. C.] 348.) Defendant James B. Mingay had no further interest in the tenancy after its conveyance to the plaintiff, in whom it became vested, and whose property therein cannot be destroyed by said defendant's death. (*Robinson v. Govers*, 138 N. Y. 425; *McKean v. Fish*, 33 Hun, 30; *Fulton v. Fulton*, 8 Abb. [N. C.] 210.) The provision at the end of the judgment that the parties may at any time apply, at the foot of the judgment, for further order or direction, is of no avail to the defendant Mary Estelle Lackey. That provision refers only to the question of details in carrying out the judgment and does not affect its essential provisions. (*Taggart v. Hurlburt*, 66 Barb. 553.) The motion was premature and should for that reason have been denied. (Code Civ. Pro. § 1577; *Tilton v. Vail*, 117 N. Y. 521. The judgment cannot be altered or amended upon motion. It is an adjudication binding upon the parties, and conclusive as to them, and is an estoppel. (*Riggs v. Parcell*, 74 N. Y. 378.)

Edwin S. Babcock for respondent. The judgment is merely interlocutory and not a final one determining the rights of the parties. (*Cruger v. Douglass*, 2 N. Y. 571; *Clark v. Brooks*, 2 Abb. [N. S.] 404, 407, 585; *Smith v. Lewis*, 1 Daly, 452; *Morris v. Morange*, 38 N. Y. 172, 174; Code Civ. Pro. §§ 1200, 1545, 1546, 1576, 1577.) Being an interlocutory judgment in partition, and no proceedings taken under it, it was still within the control and power of the court to modify it as to provisions which had become inoperative and absurd, and in the interests of justice to conform it to existing facts, and obviate a mistake in fact not arising at the trial. (*In re Price*, 67 N. Y. 231, 235, 236; *In re Buffalo*, 78 id. 362, 370; Baylies on New Trials, 6; *McCall v. McCall*,

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54 N. Y. 541-548; *Brown v. Brown*, 58 id. 610; Code Civ. Pro. § 724.) The modification of the interlocutory judgment by the order appealed from was proper and requisite in the interests of justice. Plaintiff's right, as assignee of a life estate, to any part of the proceeds to be derived from a sale of the land as a sum in gross for the value of that life estate ceased when the estate itself was terminated by death of the life tenant before the sale. (*McKeen v. Fish*, 33 Hun, 28; 99 N. Y. 645; *Robinson v. Govers*, 138 id. 425; *Mulford v. Hiers*, 2 Beas. 13; *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505.) The order of the Special Term modifying the interlocutory judgment so as to conform to the facts, was a matter in its discretion, and that discretion has been ratified and confirmed by the court in banc, and will not be reviewed here. (*Grant v. Griswold*, 82 N. Y. 569, 571.)

ANDREWS, Ch. J. The judgment of April 8, 1893, was interlocutory and not final. It declared the then existing rights and interests of the parties to the litigation in the land. But it divested no titles. It directed a reference for sale, for inquiry for computation and for accounting. It provided for a distribution of the proceeds of the sale based upon the several interests in the land which should be included in the sale. But the sale would become binding only upon confirmation by the court, and until confirmation the purchaser would not be required to pay the purchase money, and until the purchase money was paid or secured there would be no fund for distribution. The practice in partition proceedings of entering in the first instance an interlocutory judgment, to be followed by a final judgment upon the termination of the proceedings authorized by the interlocutory judgment, prevailed in chancery and is expressly authorized and required by the Code. (1 Barb. Ch. Pr. 327; *Clarke v. Brooks*, Ct. App., 2 Abb. [N. S.] 385; Code of Civil Pro., §§ 1545, 1546, 1577.)

James B. Mingay as the original tenant by the curtesy was properly joined as defendant in the action. He had conveyed his life estate to the plaintiff. He was a proper party in order

to conclude him by a judgment, adjudging that his title had been vested in the plaintiff. When the interlocutory judgment was rendered the life estate of John B. Mingay had not terminated. It was an estate in the land, which, if he had continued in life, could only be divested by a sale of the land and the final judgment confirming the sale. If he had survived that event he would have been entitled to an interest in the proceeds, represented by a gross sum. But that sum, whatever it may have been, would have been awarded to him for his estate which passed by the sale. The interlocutory judgment is based on this view. It assumes that the estate by the curtesy will continue and be in existence at the time of the sale, and will then be sold. It in terms directs that the "said tenancy by the curtesy be included in the sale." It declares that the purchasers shall hold the property free and discharged of any claim by virtue thereof. It provides for the payment of a gross sum "in satisfaction of the said tenancy by the curtesy, to be fixed by the said referee according to the principles of law applicable to annuities." These provisions would be absurd and unmeaning unless they contemplated that the life estate of James B. Mingay would be in existence at the time of the sale and would be extinguished thereby. If the life estate terminated by the death of the life tenant before the sale, there would be no life estate to sell; the purchasers would need no discharge therefrom; and unless the life tenant survived the sale, there would be no basis for fixing a gross sum out of the proceeds, estimated by the probable duration of life under the annuity tables, for the life would be gone. The statute also contemplates that the proceeds of sale in partition proceedings are to be distributed among the persons whose interests are affected by the sale. Section 1580 of the Code declares that the proceeds of sale "must be awarded to the parties whose rights and interests have been sold, in proportion thereto." The death of the life tenant after the interlocutory judgment and before any further proceedings had been taken, rendered impossible the execution of the part of

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the judgment directing that the sale should include the life estate and the provisions for ascertaining its value. If the subject of the partition had been property of which actual partition could be made, and the interlocutory judgment had provided that the life tenant should have actual possession during his life, his death would at once terminate any right under the judgment. When the judgment provides for a gross sum, and before any sale is had the life tenant dies, it would be most inequitable to charge the proceeds with the supposed value of a life which had already terminated. The case of *Robinson v. Govers* (138 N. Y. 425) does not justify the claim of the plaintiff. There the dowress had consented to take a gross sum, based on the value of the lands. The sum had been judicially ascertained and the court had confirmed the final report of the referee providing that the plaintiff was entitled to the sum specified. The actual entry of the order on the decision was the only thing lacking to formally complete the proceeding and constitute a perfect judgment fixing the plaintiff's right. It was held that her death, after the decision and before the entry of the order, did not defeat the claim, and that an order might be entered as of the time when the decision was made. The proceedings in the present case had not reached the point of a final ascertainment of the sum which should be paid for the value of the life interest. The proceeding was tentative and incomplete, and the right of the life tenant to a share of the proceeds was conditional, and not fixed and absolute. We entertain no doubt of the power of the Special Term to correct the interlocutory judgment to make it conform to the new situation brought about by the death of the life tenant after that judgment was entered and before any further proceedings had been taken. It was, we think, a power inherent in the court in the interest of justice. (See *McCall v. McCall*, 54 N. Y. 541; *Matter of Price*, 67 id. 231; *Matter of City of Buffalo*, 78 id. 362.)

The orders of the General and Special Terms should be affirmed.

All concur.

Orders affirmed.

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JACOB LORILLARD, Respondent, v. WILLIAM P. CLYDE et al.,
Appellants.

Where the performance of a contract depends upon the continued existence of a person or thing which is assumed as the basis of the agreement, the death of the person or the destruction of the thing terminates the obligation.

So, also, if after a contract is made the law interferes and makes subsequent performance impossible, the party is held to be excused.

The parties, who were engaged in and were competitors in the business of water transportation, entered into an agreement to combine their interests. This provided that a corporation should be organized, each to contribute thereto an equal amount of capital in the vessels and properties then employed by them, defendants to have the management of the business and to receive commissions for its performance. In consideration thereof defendants guaranteed to plaintiff a dividend of not less than seven per cent per annum on his shares for seven years. Dividends when earned were to be declared and paid quarterly, and during the seven years neither party was to be interested in any competing steam water line without the consent of the other. The corporation was organized and the business carried on by it for about five years, when, by the judgment in an action brought by the attorney-general in the name of the People, the corporation was dissolved and a receiver appointed. In an action to recover the amount so guaranteed for the two years subsequent to the dissolution, *held*, that the parties contracted upon the assumption of corporate existence during the period covered by the guaranty; that the dissolution took away for the future the whole consideration upon which the guaranty was based, and so relieved the defendants from liability thereon.

It was claimed by plaintiff that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and so, they were estopped from interposing it as a defense. The grounds of forfeiture upon which the judgment in the People's action was based were technical violations of the statute under which the corporation was organized, not affecting any public interests, and for some of them plaintiff was as much responsible as defendants. The action was brought upon the application of plaintiff he gave the bond required by the attorney-general as security for costs, and also verified the complaint. *Held*, that plaintiff owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment of dissolution proceeded; that as between the parties themselves there was no cause for dissolution; and, as plaintiff procured the judgment, that defendants were not precluded from availing themselves of it as a defense.

(Argued March 6, 1894; decided June 5, 1894.)

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Statement of case.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made October 24, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to recover upon a guaranty of dividends upon plaintiff's stock in the Philadelphia and New York Steam Navigation Company for the years ending July 1, 1880, and July 1, 1881, contained in a contract between plaintiff and defendants.

The provisions of said contract and the facts, so far as material, are stated in the opinion.

James C. Carter for appellants. The contract upon which the action was brought clearly contained the condition, although it was unexpressed, that the corporation should continue to exist during the period embraced by it. (*Dexter v. Norton*, 47 N. Y. 62; *Taylor v. Caldwell*, 113 Eng. C. L. 824; *People v. G. M. Ins. Co.*, 91 N. Y. 174; *Farrows v. Wilson*, 4 L. R. [4 C. P.] 744; *Wolf v. Howes*, 24 Barb. 174; *Stewart v. Loring*, 5 Allen, 307.) The dissolution and consequent destruction of the corporation before the time when the dividends in respect to which the action was brought could have fallen due put an end to the contract. The consideration entirely failed at that point. (*People v. G. M., etc., Co.*, 91 N. Y. 174; *Farrows v. Wilson*, 4 L. R. [4 C. P.] 744; *Wolf v. Howes*, 24 Barb. 174; *Stewart v. Loring*, 5 Allen, 306; *Knight v. Bean*, 22 Maine, 531; Benjamin on Sales, § 570.) The plaintiff attempts to escape from the consequences of the foregoing proposition by asserting that it cannot apply to the case where the destruction of the thing has been accomplished by the wrongful act of the party who seeks to excuse himself from the performance of the contract by alleging its destruction; and he asserts that the destruction of the corporation in this instance was caused by the wrongful acts of the defendants, or of one of them, in the management of it. The judgment appealed from cannot be thus supported. (*People v.*

G., etc., Ins. Co., 99 N. Y. 174; *People v. B. T. Co.*, 23 Wend. 222; Whart. on Neg. §§ 134, 135; *M. C. R. R. Co. v. Burrows*, 33 Mich. 15.) The plaintiff cannot take the ground that the attorney-general ought to have brought the action. It was not an action in which there was any public interest, as he himself had fully recognized by offering and giving to the People the indemnity required by law in such cases. (Code Pro. § 430.)

Richard L. Sweezy for respondent. A person who has destroyed the subject-matter of a contract by his own act, or who has made performance thereof impossible by his own wrong, can found no defense thereupon. (3 Am. & Eng. Ency. of Law. 907; *Woolner v. Hill*, 93 N. Y. 376; *Hawley v. Keeler*, 53 id. 114; *Crist v. Armour*, 34 Barb. 378; *James v. Burchell*, 82 N. Y. 108; *Niblo v. Binnæ*, 3 Abb. Ct. App. Dec. 775.) The assumption of appellants' counsel that the acts which furnished ground for the dissolution of the corporation were done in pursuance of agreement with plaintiff is entirely without foundation. (*Lorillard v. Clyde*, 99 N. Y. 196; 122 id. 41; 102 id. 59; 16 J. & S. 409.)

ANDREWS, Ch. J. The validity of the contract upon which the action is brought was adjudicated in the case reported in 86 N. Y. 384. The divisible character of the obligation of the defendants, and the right of the plaintiff to maintain separate actions for successive payments on the guaranty as they fell due has also been settled. (122 N. Y. 41.) The plaintiff in the actions heretofore brought has recovered under the contract dividends or the equivalent of dividends on his stock at the rate of seven per cent per annum from July 1, 1874, to July 1, 1879, a period of five years antecedent to the dissolution of the corporation. The present action is to recover such dividends for the two succeeding years, which complete the term of seven years specified in the guaranty.

The effect of the dissolution of the corporation upon the contract of guaranty as to payments subsequently accruing

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thereon presents the new question involved in the present litigation. Its solution rests primarily upon an interpretation of the contract. The object of the contract, as stated therein, was the consolidation of the interests of the respective parties in the business of water transportation between New York and Philadelphia. They were competitors in the business. The plaintiff owned and ran steamships between these ports by the outside route, and the defendants conducted their business between the same ports by means of tugs and barges running upon the canals and inside water routes. The outside business could be carried on during the whole year. The business by the inside routes was of necessity suspended during the time the canals were closed by frost. The plan of combination was to organize a corporation to which each of the interests would contribute an equal amount of capital in the properties then employed by each in the business of transportation, at an agreed valuation, any difference in value to be equalized by payment by the one party to the other. The written contract embodied the scheme. It provided for the organization of a corporation under the law of New York, with a capital of \$300,000; designated the vessels to be contributed by each interest and fixed their value; provided for the payment by the Clydes to the plaintiff of \$20,000 for equality of interest. Among other provisions is the following: "William P. Clyde & Co. to have the management of said corporation and business, and in consideration thereof to guarantee to Jacob Lorillard a dividend of not less than seven per cent per annum for seven years, and to receive for such management the usual commission of two and one-half per cent in and five per cent out at each end, of the freights earned." The corporation was organized; a board of five directors was designated in the certificate of incorporation; one-half of the stock, being fifteen hundred shares, was issued to the plaintiff, and the other half to W. P. Clyde & Co., except that *three* shares of the par value of \$100 each were, by the direction of the Clydes, taken from their one-half and certificates issued to three clerks who were named as directors, in order to qualify

them under the statute. The business of the corporation was *carried on* under the management of W. P. Clyde & Co. until April, 1879, when a suit was brought in the name of the People by the attorney-general to dissolve the corporation and a temporary receiver appointed. The case was tried and resulted in a judgment dissolving the corporation and the appointing of a permanent receiver. It is unnecessary to enter into greater detail at this time of the facts disclosed by the record. Other facts will be hereafter referred to.

The question whether the obligation of the defendants under their guaranty continued in force as to the part of the seven years, unexpired at the time of the dissolution of the corporation, in the absence of any responsible agency of either party for the causes which led to the dissolution, must be determined by the intention of the parties as ascertained from the language of the contract, and, if ambiguous, from such language and the surrounding circumstances. The contract contains no explicit statement on the subject. It assumed that the corporation would be in existence during the whole period over which the guaranty extended. The guaranty was not for the yearly payment of a sum equal to seven per cent on the capital of the plaintiff in the corporation, or on the nominal amount of his stock. It was, that the dividends of the corporation should annually for seven years equal that sum. The plaintiff would under the contract and by virtue of his right as a stockholder be entitled to dividends declared by the company, whether they should be more or less than seven per cent per annum, and if dividends less than that amount should be made, the liability of the defendants on their guaranty would be limited to a sum sufficient to make up the deficit. In case the dividends equalled or exceeded seven per cent there would be no liability, and in case no dividends were declared then the guaranty would stand in the lieu of dividends. The contract provided that "accounts shall be made up and dividends when earned shall be declared and paid quarterly," and it was also provided that during the seven years neither party should be interested "in any com-

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peting steam water line between New York and Philadelphia without the consent of the other party in writing." The fact that guaranty was of "dividends," which implies the existence of the corporation during the time specified capable of earning and declaring dividends, and the prohibition against either party becoming interested in competing lines during the same period, inserted for the protection of the corporate business, plainly indicate that the parties were dealing upon the assumption of corporate existence during the period covered by the guaranty. But this becomes much more plain when the nature of the transaction in which the parties were engaged and the consideration upon which the guaranty rested are considered. The real purpose of the parties was to combine their properties and conduct the transportation business between New York and Philadelphia as a joint business, each contributing the same amount of capital and being equally interested in the vessels. The arrangement was substantially a partnership with a corporate organization. The consolidation would prevent competition and presumably benefit both interests. The management of the business was by the contract to be vested in W. P. Clyde & Co., and "in consideration thereof" and of their right to receive the usual commissions on inward and outward bound freight which was given them, they agreed to guarantee to the plaintiff dividends at the rate and for the time specified.

It is incontrovertible that the right to manage the business of the corporation and to earn and to receive the commissions on freight were the considerations upon which the guaranty rested. The plaintiff conceded these rights to the Clydes for this equivalent. The defendants could receive the benefits of the contract only in case the corporation should continue in being during the running of the guaranty. The death of the corporation would terminate their management; prevent their earning commissions; the business would end, and the court, in administering the assets, would return to each party his proportion of the capital remaining for distribution. The death or dissolution of the corporation would withdraw all the

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capital invested, so far as it remained, and take away for the future the whole consideration upon which the guaranty was based. There would thereafter be no corporation earning or capable of earning dividends, and nothing left upon which the obligation to pay them could be predicated. The general doctrine that when a party voluntarily undertakes to do a thing, without qualification, performance is not excused because by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do, is well settled. This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane* (Aleyn Rep. 26) is that as against such contingencies the party could have provided by his contract. (See *Harmony v. Bingham*, 12 N. Y. 99; *Ford v. Cotesworth*, L. R. [4 Q. B.] 134; *Jones v. U. S.*, 96 U. S. 24.) But it is now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services; for the sale of specific chattels, or for the use of a building, are held to fall within this principle. (*Dexter v. Norton*, 47 N. Y. 62; *People v. Globe Mutual Ins. Co.*, 91 id. 174; *Taylor v Caldwell*, 113 Eng. C. L. 826.) These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts in accordance with the manifest intention construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrives. So, if after a contract is made the law interferes and makes subsequent performance impossible, the party is held to be excused. (*Jones v. Judd*, 4 N. Y. 412.)

It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises and excuses performance. But where the

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contract is based on the assumed existence and continuance of a certain condition, or upon the continuance of a subject-matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind. The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven years period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life? There is in the present case, we think, an element which strengthens the conclusion we have reached, that the obligation of the contract terminated *prima facie* with the dissolution of the corporation. There is something more than an implied and wholly unexpressed condition that the corporation should continue in life during the seven years. It is the fair construction of the language of the contract itself. The contract was not unilateral. It contains mutual stipulations. These mutual stipulations by their terms look to the continuance of the corporation, and the mutual obligations into which the parties entered are qualified by this understanding.

The plaintiff, however, seeks to avoid the force of the proposition that, by the true construction of the contract, the obligation of the guaranty as to future payments did not survive the dissolution of the corporation, by the claim that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and that they cannot interpose the

judgment of dissolution brought about by their own misconduct as a defense. We think the answer to this claim is that, as between these parties and in this action, the plaintiff himself must be considered as having procured the dissolution of the corporation. The grounds upon which the court in the People's action proceeded in adjudging the dissolution are set forth in the judgment, which is an exhibit in this action. The act of 1852, under which the corporation was organized, is a general law for the incorporation of steam ocean navigation companies. The act offers to any seven or more persons the opportunity to organize a corporation thereunder. It specifies what the certificate to be filed shall contain, and, among other things, that it shall specify "the ports between which the vessels (of the corporation) are intended to be navigated." (Sec. 1.) The corporators may insert one or many routes at their pleasure. The act also directs that the corporation shall be managed by not less than five nor more than nine directors, who shall be shareholders. (Sec. 3.) The sixth section makes the stockholders severally individually liable for the debts of the corporation to an amount equal to the amount of the stock held by them respectively "until the amount of its capital stock shall have been paid in and a certificate thereof shall have been made and recorded." The 7th section makes it the duty of the president and a majority of the directors, within 30 days after the payment of the last installment of the capital stock, to make and verify a certificate of the fact, "and within said thirty days record the same in the office of the clerk of the county in which is located the principal business office of the corporation." The grounds of forfeiture upon which the judgment in the People's action was based, as near as can be gathered from the record, were (1) that three of the five directors were disqualified, not being stockholders in the company; (2) that no certificate of the payment in full of the capital stock of the corporation had been made and filed as required by the 7th section of the act, although fully paid up in 1874; (3) that annual meetings of the stockholders for the election of directors had not been held; (4) that the corpora-

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tion had at times diverted some of the sea-going vessels from the route designated in the certificate to other sea routes. In support of the first ground of forfeiture it was shown on the trial of the action that the defendants, after making a transfer on the books of the corporation of one share of stock to each of the three clerks who were named as directors, took back an assignment from each in blank of the share standing in his name and continued to hold the same until the dissolution. As between the plaintiff and defendants this accomplished the purpose which was an essential part of the agreement between them, that each of the parties should hold an equal amount of the stock of the corporation. The fourth ground of forfeiture was based on the fact that ships from time to time belonging to the corporation were employed on other routes than the one mentioned in the certificate of incorporation. The contract between the parties contemplated that during the summer months, when the business could be carried on by the inside route, the outside vessels might be employed on some route other than that specified in the certificate, and the contract provided that "the managers may temporarily divert any of the property of the corporation where it can be more profitably employed." In pursuance of this authority the plaintiff, during the first year, ran vessels on behalf of the company on other routes than the one designated. Assuming that the several acts and omissions adjudged in the People's action were violations of corporate obligation and duty, which under section 430 of the Code of Procedure in force when the proceedings to annul the charter of the corporation were taken, authorized the state to bring and maintain that action, it is difficult to see how any public interest required a resort to this remedy. The irregularities and omissions, so far as appears, would have been corrected on notice to the corporation, but no such notice was given. The section of the Code referred to makes it the duty of the attorney-general, upon leave granted, to bring an action to annul the charter of a corporation for any of the acts or omissions specified in that section, "in every case of

public interest." But in other cases, only where "satisfactory security shall be given to indemnify the People of this state against the costs and expenses to be incurred thereby." The section discriminates between violations of corporate duty affecting "public interests," or as was said in *Thompson v. People* (23 Wend. 583) where a corporation has committed "some misdemeanor in the trust injurious to the public," and technical, incidental or immaterial violations which, although strictly involving liability to forfeiture, might not seem to require this drastic procedure. In the one case the attorney-general is bound to act. In the other only when required to act by the intervention of some other party, and he indemnifies the state and assumes the burden of the litigation. The plaintiff in this action was the active promoter of the People's action. The suit was instituted upon his application; he gave the bond required by the attorney-general and verified the complaint; the suit was carried on and tried by private counsel employed by him. It is safe to say that unless for his active intervention the suit would never have been prosecuted. If you go back of the judgment to inquire for the cause of the dissolution, you come to the plaintiff as the proximate and efficient agency in procuring it. He owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment proceeded. For some of them he seems to have been as much responsible as the defendants, and that in doing what he did he was not actuated by a regard for the public interest, or by a sense of public duty, the record contains ample evidence. We think that the finding that the defendants forfeited their management of the corporation by their own wrongful acts is not sustained by the evidence, in the sense that they were wrongful as to the plaintiff, or that as between these parties they were the cause of the dissolution. Even if the true construction of sec. 430 is that it is only in cases where the proof of violations of corporate duty is uncertain that the attorney-general is not bound to bring an action, this would not, we think, change the result. The plaintiff procured it

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to be brought, and he must be regarded as the responsible cause of the dissolution.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

HENRY G. KEASBEY et al., Appellants, v. THE BROOKLYN
CHEMICAL WORKS et al., Respondents.

To bring a case within the rule prohibiting the adoption of a word as a trade mark which is descriptive of the character and composition of the article to which it is applied, it must appear that the word gives some reasonably accurate and distinct knowledge upon those points.

Plaintiffs, who were manufacturers of chemical and medicinal preparations, in 1881 began the manufacture of a secret medical preparation of caffeine. To distinguish this preparation from others and to establish a trade mark, plaintiffs devised and affixed to the bottles containing the preparation labels, upon which were printed the words "Bromo-Caffeine." This label they registered as a trade mark in the patent office, in compliance with statute. The preparation so labeled was extensively advertised by plaintiffs, and they have continued to manufacture and sell the same. Defendants in 1890 began the manufacture of a similar preparation, to which they applied the name of "Bromo-Caffeine," which was affixed to the bottles containing it. In an action to restrain such use of the words as a violation of plaintiffs' trade mark these facts appeared: While the name "Bromo-Caffeine" had been applied in Germany to a chemical compound of no practical utility, and not an article of commerce or generally known, it never had, previous to plaintiffs' adoption of it, been used to designate any medicinal preparation, and there was no identity of substance or nature between the chemical and the medicinal preparation. Plaintiffs' preparation is composed of seven different ingredients, of which bromide of potassium, a compound of bromine and potassium, an alkali, is one, and caffeine is another. There is no free bromine in it. Bromine enters into combination with many different alkalies, and there are a large number of other organic compounds into which it enters. The preparation sold by defendants contained bromide of sodium instead of bromide of potassium. The evidence also disclosed that the word "Bromo" did not necessarily indicate the presence of any bromide. *Held*, that the evidence justified a finding that the words so used by plaintiffs did not impart such information as to the general characteristics of the preparation to which they applied it

as to prevent the adoption of them as a trade mark; and that plaintiffs were entitled to the relief sought.

Caswell v. Davis (58 N. Y. 223), distinguished.

(Argued April 17, 1894; decided June 5, 1894.)¹

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 6, 1892, which reversed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and ordered a new trial.

This action was brought to restrain defendants from using the words "Bromo-Caffeine," which plaintiffs claimed as a trade mark.

The facts, so far as material, are stated in the opinion.

William G. Choate for appellants. There having been no appeal from the order of the Special Term containing the findings of fact and directing judgment, the question as to whether or not the name "Bromo-Caffeine" is descriptive of the plaintiffs' article was not before the General Term. (*Reese v. Smyth*, 95 N. Y. 645.) But by the undisputed evidence it is apparent that the name "Bromo-Caffeine" is not in fact descriptive, even if that question had been before the General Term and were now open on this appeal. (*Selchow v. Baker*, 93 N. Y. 59.) It is no objection to the validity of a trade mark that the name has been used for another purpose, as an old name may be applied to a new use, and thus become a valid trade mark. (*Newman v. Alvord*, 49 Barb. 588; 51 N. Y. 189.) The foregoing rule, namely, that an old word may be applied to a new use and be a valid trade mark, obtains *a fortiori* when such old word is unknown and not in common use. (*E. S. Co. v. Hazard*, 29 Hun, 269; *Hier v. Abrahams*, 82 N. Y. 519.) It is no objection to the validity of a trade mark that it suggests without describing the thing or ingredients of which it is made. (*Burnett v. Phalon*, 9 Bosw. 192; *Waterman v. Shipman*, 130 N. Y. 310.) The term "Bromo-Caffeine" as

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applied to the plaintiffs' preparation is not descriptive. (*Town v. Stetson*, 5 Abb. Pr. [N. S.] 218; 3 Daly, 53; *Ayer v. Rushton*, Codd. Dig. 229; *Caswell v. Davis*, 58 N. Y. 223; *Godillot v. Hazard*, 49 How. Pr. 5; *D. & H. C. Co. v. Clark*, 13 Wall. 311; 18 How. Pr. 64.) The term "Bromo-Caffeine" as used in chemistry, being a foreign word entirely, may be a lawful trade mark, although descriptive of the chemical compound in the foreign country. (*Rillet v. Carlier*, 61 Barb. 435.) Independently of any question of trade mark, the plaintiffs are entitled to relief on the ground of unfair competition. (Browne on Trade Marks [2d ed.], § 43; *Koehler v. Sanders*, 122 N. Y. 65; *Newman v. Alvord*, 49 Barb. 588; 51 N. Y. 189.) The defendants cannot defeat the plaintiffs' right by using their own name instead of the plaintiffs', on the infringing article. (*Hageman v. O'Byrne*, 9 Daly, 264.) In the courts below it was claimed by the defendants that the term "Bromo-Caffeine," having become the established name of a well-known substance, namely, the medical preparation made by the plaintiffs, it could not be claimed as a trade mark; this is untenable. (*Selchow v. Baker*, 93 N. Y. 66; *C. Co. v. C. Co.*, 32 Fed. Rep. 94; *C. M. Co. v. Read*, 47 id. 712.) The exceptions to the judge's refusal to make certain proposed findings of fact are unimportant and in no way affect the proper decision of this appeal. (Code Civ. Pro. § 1338; *Davis v. Leopold*, 87 N. Y. 620; *Steubing v. R. R. Co.*, 138 id. 660; *Wiltzie v. Eaddie*, 4 Tr. Af. 481; *McCulloch v. Dobson*, 133 N. Y. 114.)

Herman Aaron for respondent. The name "Bromo-Caffeine" is clearly descriptive, indicating the essential ingredients of the plaintiffs' preparation. (*Caswell v. Davis*, 58 N. Y. 223.) The name "Bromo-Caffeine," being the name of a chemical compound, and describing its nature, composition and ingredients, cannot be the subject of a trade mark. (*Caswell v. Davis*, 58 N. Y. 223; *A. M. Co. v. Spear*, 2 Sandf. 599; *Fettridge v. Wells*, 4 Abb. Pr. 144; *Keasbey v. B. C. Works*, 41 N. Y. S. R. 437.) The plaintiffs, having no

patent, have no exclusive right to the manufacture in which they deal. (*Canhan v. Jones*, 2 V. & B. 218; *Thompson v. Winchester*, 19 Pick. 214; *James v. James*, L. R. [13 Eq.] 421.) The suggestion made by plaintiffs that "Bromo-Caffeine" was a chemical and not a medicine is without force. (*Caswell v. Davis*, 58 N. Y. 236.) The mere fact that "Bromo-Caffeine" is a combination of the words bromine and caffeine, it is submitted, is fatal to plaintiffs' claim. (*Caswell v. Davis*, 58 N. Y. 236.) Persons who sell articles under false names cannot invoke the protection of a court of equity on an application for an injunction. (*Fettridge v. Wells*, 4 Abb. Pr. 144; *Wolfe v. Burke*, 56 N. Y. 115.)

PECKHAM, J. This action was tried by the court without a jury, and judgment was given in plaintiffs' favor enjoining the defendants from the use of the words "Bromo-Caffeine" upon bottles containing a substance similar to that sold by the plaintiffs under that name. The injunction was granted on the ground that the defendants by such use of the above words infringed upon and violated the legal rights which the plaintiffs had acquired in the exclusive use of those words for the purposes of a trade mark.

The General Term of the Supreme Court reversed the judgment, and granted a new trial, holding that the plaintiffs had established no legal right to the exclusive use of the words. It does not appear in the order of reversal that the General Term reversed the judgment upon any question of fact, and it must, therefore, be presumed that it was not reversed upon any such question. (Code of Civil Pro. § 1338.) If there be any evidence to sustain the findings of fact by the court, those findings are conclusive upon us, and the only question remaining would be whether those facts sustained the conclusions of law based upon them. The plaintiffs are manufacturers of chemical and also of medicinal preparations. In 1873 they began the manufacture of caffeine preparations, and they say that they practically created the demand in medicine for them in this country. They testified that they

had been annoyed by having other manufacturers make similar preparations and sell them for those prepared by the plaintiffs, and so they devised their last preparation and affixed labels to the bottles containing it, on which were printed the words "Bromo-Caffeine," and the plaintiffs also complied with the law providing for registering labels as trade marks in the patent office at Washington. This use of the above words was commenced in the year 1881 by plaintiffs, and they have spent between three and four hundred thousand dollars in advertising their trade in the preparation thus sold. Notwithstanding this enormous expense thus incurred by plaintiffs their claim to the exclusive use of the words as a trade mark is denied by defendants, because, as they allege, the words used for that purpose were in common use at the time of their adoption by plaintiffs, and it is maintained that they indicate the character, quality and composition of the preparation made by plaintiffs, and that they correctly describe an article of trade so that its qualities, ingredients and characteristics would be recognized upon seeing or hearing the words.

The defendants urge that this case comes within the principles laid down in *Caswell v. Davis* (58 N. Y. 223), while the plaintiffs claim that it is like those cases where the trade mark, while more or less suggestive of the ingredients, characteristics or composition of the article to which it was applied, yet did not define the facts to such an extent as to thereby forfeit protection for the exclusive use of the words as a trade mark for the particular article manufactured.

Before proceeding with the question further it will be well to see exactly what facts have been found by the trial court. It has been found that the manufacture of chemicals and of medicinal preparations are separate and distinct industries. In 1881 the plaintiffs commenced and have ever since continued the manufacture of a secret preparation of caffeine, composed of certain ingredients specially set out in the findings. This is a medical preparation and made for and adapted to the relief of headaches and other nervous disorders. In order to distinguish the preparation from all others, and to establish a

trade mark, the plaintiffs designated and applied to the preparation a new, arbitrary and fanciful name, which does not describe the article or its ingredients, the name being "Bromo-Caffeine," which name had never been before used in medical science to designate any other medicine or medicinal preparation, and which name the plaintiffs thereupon applied to and have since used for the preparation sold by them, and such preparation, by the name thus adopted and used, has become widely known as the preparation of the plaintiffs, and as designating their manufacture, and the preparation has acquired a large and extensive sale in the United States and other countries, and large sums of money have been expended by plaintiffs in advertising and introducing into the market this preparation.

In the year 1890 the defendants made a preparation similar to that of the plaintiffs, and intended for the same purpose, to which they applied the name of "Bromide-Caffeine," and subsequently they changed it to the name of "Bromo-Caffeine," and this name the defendants are still using to designate their preparation. It was further found that in the year 1867 a German chemist made a compound and called the same "Bromo-Caffeine," and an account of the making of the compound, including the process of making it, was published in a chemical journal at Leipsic in 1868. The formula is also to be found as published in Watts' Dictionary of Chemistry, edition of 1872, and the article is called therein "Bromo-Caffeine." This chemical compound contains one portion of bromine, which is a virulent poison, and it is mixed in certain proportions with carbon, hydrogen, nitrogen and oxygen, and the result is that the caffeine entirely disappears. The evidence shows that the chemical compound thus described has no caffeine, but has bromine in it, and it is not an article of commerce nor is it generally known, and it is useless and valueless and unemployed, and outside the knowledge of expert or practical chemists. It is a mere curiosity of a chemical and not of a medicinal nature. While in the chemical compound the caffeine has wholly disappeared, and one atom of bromine

has replaced one atom of hydrogen, the medical compound, on the other hand, as prepared by the plaintiffs, contains no bromine at all, and does contain caffeine and bromide of potassium, and several other substances. Thus, there is no identity of substance or of nature between the "Bromo-Caffeine" of chemistry and the "Bromo-Caffeine" prepared as a medicine by the plaintiffs. The former is a worthless chemical compound, while the latter is a valuable medicine. Bromine enters into combination with many different alkalies, and, when thus combined with an alkali, it becomes a bromide of such alkali; thus, when compounded with potassium in certain proportions it is called bromide of potassium, and when with sodium it is called bromide of sodium; and so there are other organic compounds into which bromine enters besides what are termed alkalies, probably hundreds of them. The term "Bromo-Caffeine," therefore, cannot be said to indicate the presence of bromine in the plaintiffs' preparation, because in truth there is no free bromine in it, while it is equally useless for indicating the particular alkali with which the bromine has in the particular preparation combined, out of twenty or thirty different ones with which bromine will combine, some of which may not even be sedative in their effects. Further than that the words used would not show that there was necessarily any bromide used in the compound, because bromine may enter into organic compounds which are not alkalies; and the term "Bromo" does not necessarily distinguish the substance as an alkali with which the original bromine may have combined before it entered into the final preparation compounded.

There is a finding that bromide of potassium and bromide of sodium were both well known to physicians prior to 1881, as possessing certain medical properties as sedatives, and the preparation sold by the plaintiffs contained the former bromide, while that sold by the defendants contained the latter, and both were mingled with caffeine and an effervescent salt and sugar and some other ingredients. The therapeutic effect of both bromides is substantially identical.

I think the finding of the court upon these facts is well

grounded when it is said that the plaintiffs originated and applied their preparation to a new, arbitrary and fanciful name, which does not describe the article or its ingredients, and which had never been used in medical science to designate or name any other medicine or medical preparation. There is evidence which sustains the finding, and on this appeal the finding is conclusive upon us. The trade mark does not impart information as to the general characteristics and composition of the plaintiffs' preparation at least to such an extent as to render the trade mark itself invalid on that ground. It is not descriptive to any such extent as that. The name may and probably would suggest to any intelligent man a suspicion or perhaps a belief that the article had bromine or a bromide and caffeine in it in some conceivable form, together with possibly many other substances, but there is nothing in the name which necessarily suggests as the basis of this preparation any particular bromide out of the twenty odd which bromine may form with different alkalies, nor would it necessarily suggest that it was a bromide at all, for it might be one of the hundreds of other organic compounds with which bromine combines. Upon these facts how can it be said that by the use of these words there is any such description of the article as indicates to the public the principal ingredient of which the article is composed?

The word "Bromo" cannot be claimed as descriptive of the ingredient bromine, because the word is also used with regard to substances which have no bromine in them, but only some one of the different bromides. Neither does the word describe any particular bromide. Neither does it give any clue to the substance other than a bromide with which the bromine may have been compounded. The word fails in fact to give information as to what the ingredient is, further than a possibility as above suggested. This failure is very important, for unless the word give some reasonably accurate, some tolerably distinct knowledge as to what the ingredient is, it is clear that it is not descriptive within the meaning of that term as used with reference to a trade mark. When spoken of with refer-

ence to a preparation of which it forms a part, bromide of potassium is one ingredient, while bromide of sodium is another and a totally different ingredient, although both are substantially identical in their therapeutic effect. They are still and nevertheless distinct and different ingredients. In addition, however, is the fact that the word "Bromo" does not particularize sufficiently even to indicate that the ingredient is either one or the other of those two bromides out of the twenty or thirty bromides with which bromine may combine. And there is no finding and no proof that even the therapeutic effect of all the other bromides is either substantially or at all identical each with the other or with the two bromides above mentioned. All that any one could do on reading these words would be to guess that probably the article contained some caffeine and some bromine free or combined with some bromide or else with some other organic compound which bromine will combine with, and as to which of these almost infinite possibilities was the fact, the word "Bromo" would convey no information whatever.

The testimony of Dr. Hamilton is not contrary to this statement. He said he did not know the ingredients composing the preparation, but supposed it might contain some preparation of the Bromo, but he did not know what it contained. He would understand from the use of the word "Bromo" that some form of bromide and caffeine are combined; the phrase "Bromo-Caffeine" vaguely conveyed to his mind that there was some preparation of bromide and caffeine together. The phrase, he said, was a term and not a scientific one, and he could not tell by the word "Bromo" what particular substance the bromide had combined with. The evidence shows that the word "Bromo" does not necessarily indicate the presence of any bromide. The word is just as descriptive and just as applicable in case bromine itself were the substance combined in the compound and not a bromide at all. The word could only be said to inform one of the fact that bromine or some kind of bromide had entered into and formed part of the compound, but upon the question whether it was

bromine or one of the many different kinds of bromides, the word "Bromo" would give no knowledge whatever. A name which furnishes no information on this point cannot be said to be so far descriptive in its nature as to prevent its adoption as a trade mark so far as this question is concerned.

We think there is a distinction between the facts in this case and that of *Caswell v. Davis (supra)*. In this case the term perhaps suggests that some one among the hundreds of substances that bromine may combine with has been used in such combination together with caffeine. There are, however, some seven different ingredients in the plaintiffs' preparation, and there is no free bromine among them, and there is no evidence as to what the substance is which the bromine (if any) had combined with before being used in the preparation, and so it is plain that the words "Bromo-Caffeine" do not in fact describe the ingredients or even give any clear general idea as to what they are.

The plaintiffs adopted the words as a trade mark after consultation with counsel and before the name was in use in the United States as applied to any substance, while in the *Caswell* case the combined words were not applied to the medicine as a name to designate the ownership, origin or particular manufacture of the preparation, but solely to indicate to physicians and the community of druggists the names of the three principal ingredients of which it was composed, and these three principal ingredients were known in *materia medica* and had been prescribed by physicians many years prior to 1860. The words did in fact show forth the quality and composition of the article sold. The name adopted was "Ferro-Phosphorated Elixir of Calisaya Bark," and it was said that they did indicate to the medical profession, to the community of druggists and to the public, the principal ingredients of which the article was composed. It also substantially indicated that the Calisaya bark was treated or had been subjected to the action of the two substances, iron and phosphorous, both of them old and well-known names of articles used in medicine. All through the opinion of Judge

FOLGER it is seen that the idea is prominent that the words did indicate the chief ingredients of the article, and it was only the particular strength of the different substances in their application to the bark that the words did not convey an exact knowledge of. In this case the object was to coin a name which should not be descriptive.

We think this case comes within the doctrine of those cases which have protected the words as a trade mark although they suggested more or less the composition, quality or characteristics of the article. Some of the cases are alluded to in the opinion of RAPALLO, J., in *Selchow v. Baker* (93 N. Y. 59) and the distinction is drawn in *Electro-Silicon Co. v. Hazard* (29 Hun, 369).

Nor do we think the words were in common use when applied by plaintiffs.

They had been used to designate a certain chemical compound as hereinbefore quoted from the findings of the trial judge, but, as stated therein, that compound was not in use and had no known useful quality and was but a chemical curiosity, and the words had no known significance in the medical world at the time when they were appropriated by the plaintiffs.

We think that there is evidence sufficient in this case to support the findings of fact made by the trial court and that such findings justify the conclusions of law based upon them.

The defendants should be enjoined from the further use of a name which the plaintiffs had legally appropriated as a trade mark many years prior to the time when the defendants commenced its use. We can see no reason for an appropriation of this name by the defendants other than that arising from an effort to convert to their own use and benefit the labor and skill of another. As this name adopted by plaintiffs does not describe the ingredients entering into defendants' preparation, an injunction restraining the latter from the use of the name adopted by the plaintiffs can inflict no injustice upon defendants. And they should not be permitted to acquire any advantage to themselves by the unlicensed use of the plaintiffs' trade mark. It could only be used by the defendants for

a fraudulent and illegal purpose and the plaintiffs should be protected from such an improper use.

The order of the General Term should be reversed and the judgment entered upon the decision of the trial judge should be affirmed, with costs in all courts to the plaintiffs.

All concur.

Ordered accordingly.

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148	649

WILLIAM H. CAMP, Respondent, v. JAMES J. TREANOR et al.,
Appellants.

Plaintiff and defendants, as sub-contractors, furnished material and labor in the construction of a building and filed liens therefor; the contractor having failed and abandoned the contract, and the owner having advertised for bids for the completion of the work, they agreed that they would each put in bids. Plaintiff's bid was accepted, and the parties thereupon entered into a contract, pursuant to the terms of which a committee of their number was selected with power to carry on the work, make all necessary contracts for labor and materials, and certain of the defendants became plaintiff's bondsmen. To these bondsmen plaintiff assigned his interest in the payments, which was to be used in defraying the expenses of performance, and it was agreed that out of the payments should first be paid all just claims for material and labor, and if any surplus remained it was to be equally divided among the parties, except that plaintiff was to receive as his share ten per cent of the actual cost of the labor and materials. If a deficiency resulted, the parties agreed "to pay the same in the same proportion as the surplus was to have been divided." The performance of plaintiff's contract with the owner resulted in a loss. In an action upon the contract with defendants, plaintiff claimed that, notwithstanding the loss, he was entitled to the specified percentage. *Held*, untenable; that the enterprise was a joint one and the parties engaged in it occupied in respect to it the relation of co-partners; that only in case of a surplus was plaintiff entitled to anything.

Plaintiff, under contract with the committee, furnished a portion of the required material and labor. *Held*, that he was entitled to recover a balance unpaid therefor.

(Argued March 22, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

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January 3, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin Yates for appellants. There was not any profits realized upon Camp's contract with Long Island City, and as his ten per cent was payable out of the profits, he was not entitled to any judgment against the defendants. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Clurk v. Devoe*, 124 id. 120; *Bank of Montreal v. Recknagel*, 109 id. 482; *Englehorn v. Reitlinger*, 122 id. 76; *Coleman v. Beach*, 97 id. 545; *Jennery v. Olmstead*, 90 id. 363; *Russell v. Allerton*, 108 id. 288; *Woodruff v. R. & P. R. R. Co.*, Id. 39; *N. W. M. L. Ins. Co. v. Mooney*, Id. 113.) There is no proof that the contract made by Camp with Mehrhoff was performed in accordance with its terms. (*Byron v. Low*, 109 N. Y. 291; *Thompson v. Stewart*, 132 id. 580; *Sweep v. Morrison*, 116 id. 19; *Flaherty v. Miner*, 123 id. 382.) The plaintiff had no right to abandon his contract as the defendants, under the terms of the contract, were not required to furnish any money to carry on the same. (*Marsh v. Masterson*, 101 N. Y. 401.) The defendants should be credited with the sum found due to the plaintiff, namely, \$1,000, the difference between the amount received by Mehrhoff from the city and the amount paid by him to Mr. Camp. (*Mansfield v. N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205.)

Hector M. Hitchings for respondent. The defendants cannot defeat plaintiff's claim upon the ground that plaintiff did not complete, inasmuch as they rendered it impossible for him to do so by failing to furnish the means. (*Mansfield v. N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205; *Moses v. Bierling*, 31 id. 462; *Fleming v. Gilbert*, 3 Johns. 528; *Jugla v. Trouttet*, 120 N. Y. 21-28; *Weaver v. Bentley*, 1 Caines, 47; *Smith v. McCloskey*, 45 Barb. 610; *Belshaw v. Colie*, 1 E. D. Smith, 213; *S. S. Co. v. Holbrook*, 101 N. Y. 48, 59; *Larkin v. McMullin*, 120 id. 206; *Van Clief v. Van Vechten*,

48 Hun, 304; *Wright v. Roberts*, 43 id. 413.) The defendants' attempt to show that the contract did not express the meaning of the parties was a total failure. To entitle a party to a reformation of a contract on the ground of mistake, the mistake must be mutual and must have been shared in by the plaintiff as well as by the defendants. (*Avery v. E. L. Ins. Co.*, 117 N. Y. 451; *Born v. Schrenkeisen*, 110 id. 55.)

O'BRIEN, J. The plaintiff brought this action and has recovered upon a contract between the parties bearing date February 24, 1890, made under the following circumstances: In the early part of the year 1889 one Donnelly had a contract with Long Island City for the erection of a school house. He was to furnish the material and labor in the erection of the building for \$28,000, payable in five equal payments specified in the contract, each when the work had reached a certain stage mentioned, and the last thirty days after completion. The plaintiff in this action, as well as all the defendants, were sub-contractors under Donnelly to furnish the various materials necessary in the construction of the building, and each had furnished and delivered materials of the value of several thousand dollars, when Donnelly failed and abandoned the contract. The work had reached a stage that, except for the abandonment of the contract, about \$10,000 had been earned upon it. The plaintiff and defendants in this action filed liens for their claims, but these liens probably represented nothing unless the payments coming due were earned and payable by the city. The parties to this action were interested in the completion of the building, and the city having advertised for bids for that purpose, the parties to this action all combined and agreed among themselves that they would all put in bids at various amounts, with a view of securing the contract. The motive for this was obvious, for if they or any of them obtained the contract at a low price the surplus payable on the work done by Donnelly would be increased, and would inure to the benefit of the liens, and inasmuch as all had on hand the material they had agreed to furnish the original con-

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tractor, there was a chance to make some profit from its use in completing the building. It appears that the plaintiff's bid was the lowest, and after consultation with the defendants, who were interested with him in the matter, he entered into a contract with the city, agreeing to complete the work for \$14,000, and two of the defendants became sureties upon his bond. The parties then entered into the agreement upon which this action was based. It recites the facts before stated and is signed by the plaintiff and the defendants. They agreed between themselves to furnish bonds to enable the plaintiff to secure the contract; that a committee of two be selected from the parties with power to make all agreements for labor and materials necessary in the performance of the contract, but to be purchased from the parties themselves if in their line, and to have general charge and supervision of the work. The plaintiff assigned his interest in the payments, as they became due, to his bondsmen, who were to receive the money from the city to be used by them in defraying the expenses of performing the contract, rendering an account to all the parties. Then follows the stipulation which has given rise to this action in this language: "And it is further agreed that out of the payments due or to become due, all just claims for material furnished or labor performed under the said contract with the said city be first paid, and should there be any surplus remaining after the payment of all just claims, then such surplus to be equally divided among the parties herein named, except Mr. William H. Camp, who is to receive as his share an amount equal to 10% of the actual cost of the labor and materials used in the construction of the building as set forth and specified in the contract, and such ten per cent shall be in full settlement of all claims Mr. Camp has or shall have on account of the said contract.

"And at the time of the completion of the contract, if there is any deficiency from any cause whatsoever, then the said parties hereto agree to pay the same in the same proportion as the surplus was to have been divided."

The learned referee has found that there was no profit

made in the contract, but, on the contrary, a very considerable loss. That a commission of ten per cent on the actual cost of the materials and labor used in the construction of the building was, nevertheless, by the terms of the contract, to be paid to the plaintiff by the defendants whether the contract resulted in a profit or loss, and such commission, amounting to more than \$1,500, was awarded to the plaintiff by the judgment, and the further sum of \$932, the unpaid balance on a contract which the plaintiff had with the committee for furnishing and setting the freestone used in the construction of the building. Thus it has been held that the contract imposed an absolute obligation on the defendants to pay the commissions to the plaintiff whether there was a profit or a loss. We think that this view is opposed to the language of the contract and all the circumstances of the case. The enterprise was a joint one, and the parties engaged in it, including the plaintiff, occupied with respect to each other the relation of partners. They were to complete the building and to share the profits or bear the loss. The plaintiff's debt against Donnelly was \$2,250, and he had the first lien, and, therefore, was interested even more than the defendants in securing the unearned payments on the old contract. There was work done under that contract which had not been paid for, as the contractor had abandoned the contract before the work had reached the payment stage, but the benefit of this work would, under the new agreement, inure largely to the benefit of the plaintiff. No other reason is apparent for providing a different method of measuring the plaintiff's share than the one adopted as to the share of the defendants, unless as a method of compensation for services, and nothing was said upon that subject in the contract and there is no finding that there was any agreement to pay such compensation. Whatever was to be paid to the plaintiff under the contract was to come from any surplus remaining after paying for the labor and materials, and there was no such surplus. The defendants did not agree in that event to pay to plaintiff a fixed sum without regard to the result of the enterprise. If the defendants intended to

bind themselves to pay this comparatively large sum in any event to the plaintiff, they would have said so in words so plain as to preclude any argument as to the meaning. The contract provided a method for dividing surplus profits anticipated but never realized. I think that the correct interpretation of the agreement is that in case of a surplus the plaintiff was to have it to the extent of a certain sum measured by ten per cent of the cost of the material and labor, the balance to be equally divided between the other parties in the enterprise. The reason for adopting this method of measuring the plaintiff's interest is not quite apparent, but the words used will not permit the construction adopted by the learned referee. There is nothing in the language or the circumstances upon which to build a personal promise by the defendants to pay a fixed sum as commissions in any event. It follows that so far as the judgment is based upon such an absolute undertaking it cannot be upheld.

The plaintiff contracted to furnish the freestone and to set the same for a specified sum, that is to say, for \$4,000, and was paid from the payments made from time to time by the city to the bondsmen, as assignees, the sum of \$3,133. No reason has been suggested why the plaintiff is not entitled to enforce this contract in the same way as any other person who furnished materials or labor for the performance of a contract between the city and the plaintiff, the latter acting, not for himself, but for the others as well. The contract in form ran to the plaintiff, but it was, in fact, and for all the purposes of the case, the contract of the defendants as well, and the plaintiff is entitled to recover anything due on it for labor or materials. It is claimed on the part of the defendants that the plaintiff, in fact, never fully performed this contract; that he failed to produce the architect's certificate to that effect as the contract required. On the other hand, the plaintiff claims that he abandoned the contract when nearly completed in consequence of the refusal of the defendants to furnish money to go on with the work, and hence the obligation of the defendants to furnish money for the completion of the building, before the

expenditure of all the payments due or to become due from the city disclosed a deficiency is involved. We will not now attempt to solve the questions arising upon this branch of the case. They can be more fully and satisfactorily examined upon a new trial.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except GRAY, J., who dissents as to construction of the contract.

Judgment reversed. _____

142 484
152 520

In the Matter of the Estate of JOSIAH H. MONROE, Deceased ;
LEVI CAMPBELL, Petitioning Creditor, Respondent, CHARLES
C. ALLEN, Administrator, etc., Appellant.

An administrator, as such, has no authority or control over the real estate of his intestate, and assumes no obligation in reference to it.

He is not, therefore, precluded from foreclosing a mortgage on said real estate held by him, purchasing on a foreclosure sale and holding the land in his own right.

A Surrogate's Court has no jurisdiction to declare a trust and enforce it by decree.

In proceedings in a Surrogate's Court to remove an administrator, it is the duty of the surrogate to make specific findings of the facts upon which his decree is based ; and the duty may not be imposed upon an appellate court of searching the record for facts that should be incorporated in the findings.

In such proceedings it was charged, and the surrogate found in substance, that the administrator at the time of the death of his intestate, owned certain mortgages covering the real estate of the latter ; these he foreclosed after he entered upon the discharge of his duties, and at the sale prevented bidding by promising the creditors that he would bid in the property for the amount of his respective liens, make a private sale thereof and account to the estate for any profits realized ; that he did bid in the property, made subsequent private sales, realizing profits for which he refused to account. *Held*, that the Surrogate's Court had no jurisdiction to try those questions ; that if the executor was liable to account for the profits a court of equity was alone competent to try the issues presented, and render a binding decree.

As to whether it was competent for the surrogate to receive the testimony on the theory that the acts of the administrator were hostile to the estate and so he was unfit to continue in office, *quæra*.

(Argued April 10, 1894 ; decided June 5, 1894.)

N. Y. Rep.]

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a decree of the Surrogate's Court of Chautauqua county revoking letters of administration granted to the appellant as administrator of Josiah H. Monroe, deceased.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

William H. Henderson for appellant. Many of the facts and circumstances set forth in the petition are so vague and general that they gave no information to the administrator as to what he was to meet. The facts and circumstances, which are set forth with some definiteness, the surrogate has made no findings upon whatever. The petitioner is required to set forth in his petition the facts and circumstances. (Code Civ. Pro. §§ 2545, 2686; *Constant v. University of Rochester*, 123 N. Y. 640; *Morris v. Talcott*, 96 id. 107.) The surrogate erroneously found that the administrator, with the aid and assistance of the said appraisers and of the said Webb, did not proceed with due diligence in making said inventory and appraisal. (*Forsyth v. Burr*, 27 Barb. 542; *In re McCaffrey*, 50 Hun, 373.) This court may for itself determine whether the appellant has been guilty of such mismanagement, misconduct and dishonesty as to render him unfit to remain in office until a judicial settlement of his accounts could be had, the estate being in readiness for final settlement. (Code Civ. Pro. §§ 2576, 2586.) There is no evidence to sustain the surrogate's decree. (*In re Moulton*, 32 N. Y. S. R. 631; *Morris v. Talcott*, 96 N. Y. 100; *Jaeger v. Kelley*, 52 id. 274; *Starin v. Kelley*, 88 id. 418; *Park v. Connors*, 93 id. 118.) The Surrogate's Court had no jurisdiction to declare the appellant to be a trustee of lands purchased by him upon the foreclosure sales or of the proceeds of the re-sale of said lands by him, and then proceed to inquire into his conduct as such proposed trustee, and if his conduct is not found to be satisfactory to the surrogate, for that reason to

revoke the letters of administration. (*Fulton v. Whitney*, 66 N. Y. 548, 557; Code Civ. Pro. §§ 2472, 2481, 2685; *Calyer v. Calyer*, 4 Redf. 305; *Bennett v. Crane*, 41 Hun, 183, 186.)

A. C. Wade for respondent. The General Term having affirmed the decision of the surrogate on the facts, there is no jurisdiction in the Court of Appeals to review these decisions on conflicting evidence. (*Hewlett v. Elmer*, 103 N. Y. 156; *In re Ross*, 87 id. 514; *Johnson v. Williams*, 95 id. 668; *Marx v. McGlynn*, 88 id. 357; *Davis v. Clark*, 87 id. 623; *In re Ackerman*, 116 id. 654; *In re Cahen*, 117 id. 626; *In re Valentine*, 100 id. 607; *In re McGillivray*, 138 id. 308.) No exceptions were taken to any of the rulings of the surrogate in admitting or excluding evidence offered, or to any of his decisions, upon the trial; therefore, it leaves for the decision of this court but the single question of determining whether there is any evidence upon which the findings of the surrogate can be supported. (*In re Yates*, 99 N. Y. 94; *In re Ackerman*, 116 id. 654; *Marx v. McGlynn*, 88 id. 357; *In re Darrow*, 95 id. 668.) The first conclusion of law found by the surrogate, that by reason of his having mismanaged and injured said estate and the property committed to his charge, and by reason of his mismanagement, misconduct and dishonesty in the execution of his office the appellant is unfit for the proper execution of the trust, was proper. (Code Civ. Pro. §§ 2685-2687; *In re West*, 40 Hun, 291.) A decree revoking the letters issued should be made where the acts of misconduct, mismanagement and dishonesty are found as in this case. (Code Civ. Pro. § 2687; *In re Stanton*, 18 N. Y. S. R. 807; *In re West*, 40 Hun, 291.) The contention of appellant that he, having rendered his final account to the surrogate before the close of this proceeding and presented his petition for final settlement, that the estate was fully administered upon, and that the surrogate had no power and should not exercise it if he had, to revoke the letters of administration, is without force. (Code Civ. Pro. §§ 2686, 2687, 2750, 2799; *Keech v. Sanford*, 3 Eq. Cas. Abr. 741;

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Randall v. Errington, 10 Ves. 423; *Ex parte Lacey*, 6 id. 625; *Fox v. Mackreth*, Id. 627; *Rogers v. Rogers*, Hopk. Ch. 515; *De Voe v. Fanning*, 2 Johns. Ch. 252; *Dobson v. Racey*, 3 Sandf. Ch. 61; *De Curtiss v. La Ray, Da Clarmount*, 3 Paige Ch. 178; *Munroe v. Alliure*, 2 Caines Cas. 183; *Colburn v. Morton*, 3 Keyes, 296; *Duffy v. Duncan*, 35 N. Y. 193; *Case v. Carrot*, Id. 385; *Penman v. Slocum*, 41 id. 53.)

BARTLETT, J. This is a proceeding instituted by a creditor in the Surrogate's Court of Chautauqua county to remove Charles C. Allen as administrator of the estate of Josiah H. Monroe, deceased. On the 23d of May, 1889, a decree was entered to the effect that the administrator had mismanaged and injured the estate and the property committed to his charge, and by reason of his mismanagement, misconduct and dishonesty in the execution of his office he was unfit to fill the same, his letters of administration were revoked, and he was charged personally with the costs and disbursements of this proceeding. The General Term affirmed the decree, and the administrator appealed to this court, and having since died, his executor, Thomas J. Fenton, has been duly substituted. The record discloses that the administrator received his letters September 24th, 1883; filed his inventory the following December; presented his first account in January, 1887, and a supplemental account in March, 1888. Objections were filed to the first account and the accounting stood adjourned to June 24th, 1887. Pending the adjournment this proceeding was instituted to remove the administrator, and adjourned to the same date as the accounting. Both proceedings came up before the surrogate on the 24th of June, 1887, and the administrator asked to go on with his accounting. The request was refused, the accounting postponed, and this litigation allowed to proceed. It remains for us to determine whether the decree in this long and expensive proceeding, which has postponed the settlement of the estate for years, and subjected the late administrator to public disgrace

and removal from office, can be sustained. This proceeding is instituted under sections 2685 and 2686 of the Code of Civil Procedure. The petition states three grounds for the removal of the administrator which were relied upon at the trial, viz. :

1. That the administrator has wasted and improperly applied money and assets belonging to the estate which have come into his hands as administrator.

2. That he has improvidently managed and injured the estate and the property committed to his charge.

3. That he has been guilty of misconduct in the execution of his office in numerous instances and upon divers occasions.

The very general charges of this petition were sought to be sustained by affidavit proof as required by the Code, in order that citations might issue. (Code C. P. § 2686.) As this court has no power to weigh the evidence on disputed questions of fact, and can only deal with legal error, it becomes necessary to examine the findings of fact and conclusions of law upon which the decree rests. The case on appeal is voluminous and the evidence has been introduced to a considerable extent without regard to the issues framed by the petition and answer. There are findings of fact upon matters not included in the allegations of the petition; there are numerous alleged findings of fact the mere statements of conclusions, entirely destitute of specific facts and utterly without value. The Code does not contemplate such practice, and to permit it would be to impose upon an appellate tribunal the laborious duty of searching the record for facts that should be incorporated in the findings. Of the thirty alleged findings of fact in this record nearly one-half of them are defective. The findings of fact, which are in form and substance sufficient, deal substantially with three distinct topics: First, a few items of personal property alleged to have been omitted from the inventory, the value of which would not aggregate two hundred and fifty dollars; second, an alleged corrupt offer said to have been made by the administrator to one Amos Bills, to allow as a claim against the estate a note pre-

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sented by said Bills on which he insisted there was due a little more than three hundred dollars and interest, if Bills would divide with him the amount he received from the estate; third, alleged profits realized by Charles C. Allen individually, from sales of real estate formerly owned by the intestate on which said Allen held mortgages, foreclosed after intestate's death, the mortgagee buying the property at the sales.

The petition herein, among other things, charges substantially that at the time of intestate's death the administrator owned certain mortgages covering intestate's real estate, and that after he had entered upon the discharge of his duties as administrator he proceeded to foreclose them; that at the sales the mortgagee prevented bidding by promising the creditors of the estate to bid in the properties for the amount of his respective liens, make a private sale of the same, and account to the estate for the profits realized in these transactions and thus save the expense of surplus money proceedings; that creditors and others did refrain from bidding at these sales; that the mortgagee did take title, make subsequent private sales and realized profits for which he refused to account to the estate or its creditors. The administrator denies these charges in his answer, and in substance avers that the foreclosures of the mortgages were duly and regularly conducted. It seems to have been the theory of the petitioning creditors that the administrator, acting as an individual in the pursuit of his legal remedies as mortgagee, became, by reason of the facts stated, a trustee *in invitum*, and liable to the estate and its creditors for the profits alleged to have been realized in the subsequent sales of real estate bid in by him at the foreclosure sales. It is difficult to understand upon what theory the Surrogate's Court proceeded to try questions lying wholly outside of its jurisdiction, and make elaborate findings relating to the same; it does not possess the general powers of a court of equity; if Charles C. Allen, as an individual, was liable to account for the moneys alleged to have been realized by him as before stated (we express no opinion as to his liability) a court of equity is alone competent to try the

issues presented and render a binding decree as to all parties after a full investigation of the facts. An administrator, as such, has no authority or control over the real estate of his intestate, and assumes no obligations in reference to it, and owes no duty to the heirs; he is not, therefore, precluded from purchasing such real estate at a foreclosure sale, and from holding the same in his own right. (*Hollingsworth v. Spaulding*, 54 N. Y. 636.) If the alleged profits in the hands of Charles C. Allen are to be regarded in equity as surplus moneys, they would be real estate and recoverable as such. (*Dunning v. Ocean National Bank*, 61 N. Y. 497.) The mere fact that the interest of the administrator individually was opposed to that of the estate in the transaction now under consideration presented no embarrassment and did not require his removal from office. A proper plaintiff could have invoked the aid of a court of equity, making the interested parties defendants, and the rights of all would have been fully protected. A Surrogate's Court has no jurisdiction to declare a trust and enforce it by decree. (*Fulton v. Whitney*, 66 N. Y. 557.)

It may, however, be urged that admitting the Surrogate's Court had no jurisdiction to try the issues growing out of the administrator's mortgagee interests, and compel him, by final decree, to account for alleged profits in his hands to which the estate is entitled, yet it was competent for the court to take testimony bearing on this subject upon the theory that the acts of the administrator showed him to be hostile to the estate and unfit to continue in office.

We do not decide that such evidence would not be competent under proper limitations.

If legal and substantial grounds for removal had been alleged and proved, it might well be that such evidence would tend to characterize the attitude of the administrator towards the estate.

In the case at bar we have no such situation presented; the record discloses findings covering all of these mortgagee transactions, and we cannot assume that the surrogate based

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his decree of reversal upon the trivial matters already referred to, but we are satisfied he must have given undue importance to the real estate transactions which could not be the basis of a decree removing the administrator from office.

This is a proceeding, not to punish the administrator, but to protect the estate, and it was invoked in this case under circumstances wholly unnecessary and unjustifiable.

The court found that the administrator and his sureties were financially responsible and able to make good the estate if it suffered loss. The unimportant and vexatious questions litigated in this proceeding could have been disposed of on the accounting and the administrator charged in a final decree for all losses he had caused the estate, if any such were proved.

Creditors now find themselves, after years of wasting and fruitless litigation, standing at the threshold of the accounting proceedings which afforded them an abundant remedy at the outset, and compelled to resume the settlement of this estate at the point where it was interrupted in June, 1887.

The decree of the Surrogate's Court and the judgment of the General Term should be reversed, with costs to the appellant in all courts.

All concur.

Judgment accordingly.

SAMUEL H. WILLARD, Respondent, v. HOLMES, BOOTH AND
HAYDENS, Appellant.

It seems that where a party has been subjected to some special or added grievance, by an interference with his person or property in a civil action, brought against him without probable cause, he may maintain an action for malicious prosecution, to recover any legal damages so sustained.

An action for malicious prosecution may, in a proper case, be maintained against a corporation.

To sustain an action for malicious prosecution in prosecuting a former civil action, the circumstances must appear to have been such that no reasonable man could have been influenced thereby to the belief that the former action was maintainable.

The question is, not what the actual facts were, but what defendant had reasonable cause to believe they were when instituting the former action, and if, as he so believed, they furnished reasonable cause, the failure of the action is no evidence of want of probable cause or of malice.

Plaintiff was formerly the treasurer and general manager of defendant, a corporation chartered for the purpose of manufacturing and selling certain metal goods; he was also a stockholder of a company engaged in manufacturing carbons for electric lighting purposes. He executed a contract on the part of defendant with the carbon company, under which the latter was to sell all of its manufactures to defendant. The carbon company, desiring to increase its facilities, made an arrangement with plaintiff, who undertook to procure the means by lending the defendant's credit. The capital of the carbon company was \$25,000, and at this time it was indebted to defendant over \$22,000. To carry out this arrangement the carbon company made its note payable to defendant's order, which plaintiff indorsed in its name and procured to be discounted. To take up this note the carbon company sent another note, payable to plaintiff, to A., an agent of the latter, who had authority to make and indorse notes in its name, and who was also a stockholder of the carbon company; this he indorsed and procured to be discounted and the proceeds were used to take up the former note. Plaintiff having left defendant's service, its president, in ignorance of the facts, and supposing the last note to be the renewal of a customer's note, to take it up, indorsed and procured the discount of another note, which defendant was obliged to pay. Said president having ascertained the facts, consulted defendant's attorney, and was advised by him that an action to recover damages was maintainable against plaintiff. The latter having refused to secure defendant against loss, its directors directed the prosecution of such an action. The action was brought and an attachment was issued therein. The complaint was dismissed on trial on the ground that as there was no evi-

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Statement of case.

dence that any of the directors and stockholders of the plaintiff therein (the defendant here) were ignorant of the transactions with the carbon company, it was to be assumed they acquiesced therein. Upon the trial of this action for malicious prosecution it appeared that aside from the plaintiff and A., none of defendant's directors had any knowledge of said transactions until the facts were discovered by the president. *Held*, that as the burden of proving the want of probable cause rested upon plaintiff, this necessitated that he should show that defendant authorized and acquiesced in his mode of corporate management, and as not only had he failed in this, but the contrary was established, the action was not maintainable.

(Argued April 13, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city of New York, entered upon an order made February 7, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John E. Parsons for appellant. Probable cause is defined to be a reasonable ground for a suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that a person accused is guilty of the offense with which he is charged. (*Anderson v. How*, 116 N. Y. 336; *Carroll v. Ayres*, 53 id. 114; *Foshay v. Ferguson*, 2 Den. 617; 125 N. Y. 79; *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 14 id. 85; *Bentley v. C. Ins. Co.*, 17 id. 421; *Claffin v. F. & C. Bank*, 25 id. 293; *Dutton v. Willner*, 52 id. 312; *Carman v. Beach*, 63 id. 97; *Wheeler v. Nesbitt*, 24 How. [U. S.] 544; *Heyne v. Blair*, 62 N. Y. 19.) The defendant was not required to make any further investigation to justify the commencement of the original action. (*Liston v. Perryman*, L. R. [4 H. L.] 521; *Brewer v. Jacobs*, 22 Fed. Rep. 217.) The question of probable cause does not depend upon what were in truth and fact the merits of the original action; nor does it depend upon the result of that

action. (*Fagan v. Knox*, 1 Abb. [N. C.] 248; *Stewart v. Sonneborn*, 98 U. S. 195; *Bacon v. Thorne*, 4 Cush. 217.) The defense of advice of counsel was made out. (*Stewart v. Sonneborn*, 98 U. S. 187; *Stone v. Swift*, 4 Pick. 389; *Ames v. Stearns*, 34 How. Pr. 289, 297; *Ravenga v. McIntosh*, 2 B. & C. 693; *Laird v. Taylor*, 66 Barb. 139, 143.) No malice was shown. (*Vanderbilt v. R. T. Co.*, 2 N. Y. 479; *Fisher v. M. E. R. Co.*, 34 Hun, 433; *Brooks v. N. Y. & G. L. Co.*, 30 id. 47; *Caldwell v. N. J. S. Co.*, 47 N. Y. 282; *Newman v. N. Y., L. E. & W. R. R. Co.*, 7 N. Y. Supp. 560.) The fact that an attachment was issued showed neither malice, nor did it bear upon the question of probable cause. If the defendant were justified in suing at all, it was justified in procuring an attachment. The defendant was a non-resident. (*Richardson v. Virtue*, 2 Hun, 208.) The case has so far been presented for the appellant upon the assumption that an action lies for the malicious prosecution, without probable cause, of a civil action, even where questions of law were alone or chiefly involved in the former action; and that the defendant is to be held under the same rule as would be applicable in case it had procured the plaintiff's arrest. But there is a wide difference between the two cases; and it is believed that there is no authority in the books for a recovery in a case like this, where the civil rights asserted by the defendant in the former suit depended upon the determination of questions of law. (Cooley on Torts, 189; Addison on Torts, § 863; *Q. H. Co. v. Eyre*, L. R. [11 Q. B. Div.] 674.) The plaintiff, against objection and exception, was permitted to testify that he had been requested to resign his treasurership of the Wessei Company, and that the president of the company had talked to him about the suit (the original action), and the injury it was doing the company, and that on account of that they would not care to retain him in his position as treasurer. This was hearsay. (*Kenyon v. People*, 26 N. Y. 203, 209; *Bullis v. Montgomery*, 50 id. 352, 358; *Tooley v. Bacon*, 70 id. 34; *McIlhargy v. Chambers*, 117 id. 532; *Hine v. M. R. Co.*, 132 id. 477; *Penfield*

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v. *Carpender*, 13 Johns. 350; *Irvine v. Cook*, 15 id. 239; *Bristol v. Dann*, 12 Wend. 142.)

Marshall P. Stafford for respondent. The action complained of was malicious. (Cooley on Torts [2d ed.], 218: 1 Wait's A. & D. 143, 342, 428.) A request to charge must be made in such terms that it can properly be charged without change or qualification. Otherwise it is not error to refuse it, even if it suggests or contains something that might properly be charged. (*Bagley v. Smith*, 10 N. Y. 499; *Carpenter v. Stillwell*, 11 id. 79; *Hodges v. Cooper*, 43 id. 216.)

GRAY, J. This action was brought to recover damages for the malicious prosecution of a civil action. Whether such an action may be maintained, regardless of whether the plaintiff in the former action had interfered with either the person or property of the defendant therein, is a question we are not called upon to determine. The general rule at common law that an ordinary action, maliciously brought and without probable cause, which had terminated in favor of the defendant, gave rise to a right of action, certainly seems to have disappeared in England with the enactment of statutes giving costs to successful defendants. (3 Blackst. Com. 126 [Chitty's notes]; *Quartz Hill, etc., Co. v. Eyre*, L. R. [11 Q. B. Div.] 674, 683.) In this country the authorities are not agreed upon the doctrine governing such actions; as may be seen by reference to the cases collated in the American and English Encyclop. of Law (vol. 14, p. 32). But I am prepared to assume that there may be satisfactory authority for holding that where a party has been subjected to some special, or added, grievance, as by an interference with his person, or property, in a civil action, brought without probable cause, he may maintain a subsequent action to recover any legal damage, which he avers, and is able to show, to have been occasioned to him. (See *Bump v. Betts*, 19 Wend. 421; *Whipple v. Fuller*, 11 Conn. 582; *Potts v. Imlay*, 4 N. J. L. 330; *Mayer v. Walter*, 64 Penn. St. 283, and Cooley on Torts, p. 187.) The action generally is not to

be viewed with any favor; for, in theory of law, the costs awarded by the statute to the successful defendant are an adequate compensation to him for all damages. There is no reason, of course, why the action, in a proper case, should not be maintained against a corporation. The motive for the corporate suit is imputable to the corporation and not to the individual directors. In this case it appears that plaintiff's property was attached, in the former action against him, and if it has been shown that it was instituted without probable cause and that there was an abuse of the processes of the law in the procuring of the attachment, furnishing the ground for an inference of malicious interference, the action may be said to have been attended with a special grievance; which, by adding to the expenses some injury to property, differentiated it from an ordinary action. The attachment issued upon the affidavit of the plaintiff's (this defendant's) president; alleging the non-residence of the defendant in the action. It was a process which the statute authorized and which is usual in such cases, and its use subjects this defendant to no unfavorable criticism, if it accompanied the institution of an honest suit. The complaint and the affidavit in the former action contain no charges of fraud, or of a defamatory character, and they, as well as an examination of the facts connected with its bringing and maintenance, seem to disclose only an effort to recover a sum of money, which the plaintiff's directors supposed to have been lost to the company, through the unauthorized act of the defendant, while its treasurer and managing officer. Under such circumstances, every intendment should and will be against this plaintiff upon reviewing the case presented. Such an action as the present one comes very near to being, if it is not actually, a re-trial of the former case, and, for its justification, requires the plaintiff to make out a very glaring case of the commencement of an action against him without any reasonable ground, at the time, for a belief that he had rendered himself liable thereto. The circumstances to sustain this right of action must appear to have been such, that no reasonable man could

have been influenced thereby to the belief that the plaintiff had unauthorizedly committed the company, whose officer he had been, to a liability which it should not have incurred and which was foreign to its chartered purposes. It is our judgment that the facts did not justify the trial court in submitting the case to the jury and that, upon all the evidence, it was error to deny the defendant's motion to dismiss the complaint. The material facts were not in dispute and whether there was probable cause for the prosecution of the former action became a question of law, solely, for the court. (*Besson v. Southard*, 10 N. Y. 236.)

A review of the facts will make this clear and seems justified by the magnitude of the recovery at the Circuit and the subsequent affirmance of the judgment by the General Term.

In 1886 the plaintiff, Willard, was the treasurer and the general manager of the defendant, a Connecticut corporation styled Holmes, Booth and Haydens, which was chartered for the purpose of manufacturing and dealing in brass, copper and German-silver goods etc. etc. Willard had been intrusted by the directors with a management of the company's business, which was, practically, uncontrolled. He had executed a contract between the company and the Forest City Carbon Company, a corporation in Ohio, engaged in manufacturing carbons for electric lighting purposes; under which the latter company was to sell all of its manufactures to the Holmes etc. Company. The Carbon Company desired to increase its facilities and to extend its plant and, in July 1886, made an arrangement with Willard, who undertook to procure the means by lending his company's credit. It made its promissory note to the order of the Holmes Company for \$10,000; which Willard indorsed in the name of the payee and procured to be discounted; remitting the proceeds to the Carbon Company. Before the maturity of this note, Willard resigned from the Holmes Company. In November 1886, the Carbon Company, being unable to meet its maturing note, sent on another note for \$10,000, made to the order of the Holmes Company,

to Adams, then the agent of the latter company. Adams indorsed the note with the payee's name and procured its discount. The company's check for \$10,000 was then sent to the Carbon Company; which that company used to take up its July note. During and prior to these transactions Willard and Adams were also interested, as stockholders, in the Carbon Company. After Willard left the service of the Holmes Company, Wayland, its president, succeeded him as treasurer and general manager, in the latter part of January, or early in February. Being made aware of the outstanding liability of the company as indorser upon the note, and being informed that the maker was unable to provide for its payment, he procured the discount of another note of the Carbon Company, for the same amount, at the bank and the proceeds being credited to the Holmes Company, the November note when due was charged to its account. At the time, Wayland was ignorant of the facts attending the making of the note, and supposed it related to the renewal of some customer's note. Upon investigation, he discovered the history of the matter and that, at the time when Willard, in July 1886, had agreed to lend the credit of the company in aid of the Carbon Company, in the manner mentioned, that company, with a capital of only \$25,000, was already indebted to the Holmes Company in the sum of \$22,338.47, and that a first note had been paid with funds furnished by his company. He at once consulted with the company's attorney and was advised that the company could recover damages against Willard, measured by the amount which the company had had to pay upon the note. A complaint was prepared and sworn to; which charged Willard with having indorsed the company's name upon the Carbon Company's note, without consideration received by the former company and without authority; with having remitted the proceeds of the discount thereof to the sole benefit and use of the Carbon Company and that the Holmes Company had been obliged to pay the same at maturity. Judgment was demanded against Willard for damages to the amount of the note. An affidavit was

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also prepared and sworn to; which set forth the defendant Willard's non-residence; the cause of action and that the source of the information of Wayland, the deponent, was in an inspection of the books and records of the plaintiff company. Prior to the actual commencement of the action, however, Wayland had an interview with Willard; in consequence of which Willard consented to attend at a meeting of the directors of the Holmes Company, and he then explained to them the purpose of the note transaction in July 1886; namely, to enable the Carbon Company to supply them with carbons in larger quantities and he claimed to have acted legitimately. He was asked to secure the company against loss by assigning some of his securities; but he declined to do so and the directors, refusing to excuse him, advised Wayland to proceed with the action; which was at once done. When the action came on for trial, the complaint was dismissed and judgment ordered in favor of Willard; which was, eventually, affirmed in this court. (125 N. Y. 75.) We held that the dealings with the Carbon Company were *ultra vires* the Holmes Company; but, as there was no proof to the effect that any director, or stockholder, was ignorant of these business transactions with the Carbon Company, it must be assumed that they were acquiesced in and, hence, no action should be maintained against the managing officer, for any resulting damage. If the company was, in fact, carrying on an illegitimate business to the knowledge of the directors, the general manager had the same authority and discretion as he had in the legitimate business. The failure of the company in its suit against Willard was due to the necessary assumption that, in the absence of all proof to show a want of knowledge on the part of the directors and stockholders of the business, which Willard was conducting with the Carbon Company, they must have known of and acquiesced in it. Upon the trial of the present action, it appeared that of the directors of the Holmes Company only Willard, Adams and McGill were pecuniarily interested in the Carbon Company; and that beyond Willard and Adams none of the directors had any knowledge of these transactions with

the Carbon Company, until discovered by Wayland. Willard, by virtue of his position, and Adams, by virtue of express powers, conferred by resolution upon him as agent of the company, to indorse commercial paper and to sign checks in the company's business, were enabled to conduct these transactions with the Carbon Company and, being left practically, if not actually, without supervision by the other directors, they were not discovered until brought to Wayland's attention by the failure of the Carbon Company to meet its note in March 1887 and the resulting investigation into the books. Therefore, while it is possible that, despite the ignorance of the directors concerning the full extent of Willard's transactions with the Carbon Company, due to their official inaction and blind confidence in his and Adams' management of affairs, the company itself might have been precluded from maintaining an action against Willard to recover any damages, the question was mainly one of law, and a mistaken belief as to his liability to the company, upon the supposed facts, should not have exposed the company to a suit for malicious prosecution. The burden in this action was upon the plaintiff to prove a want of probable cause for the institution of the legal proceedings against him and that necessitated that he should show that the directors had authorized and acquiesced in his methods of corporate management. He not only did not do this; but precisely the contrary was established as the truth. In the opinion of the learned General Term judges, it was deemed conclusively established that Willard had been prosecuted without probable cause; "since," to quote from it, "it would imply stultification by defendant to urge that it did not know what authority it had given plaintiff," and that knowledge of the fact was chargeable to it, because of Willard's explanation, made upon the occasion of his meeting with the directors, at the instance of President Wayland. The difficulty with the view of the General Term is that it fails to appreciate that, whatever the knowledge attributable to the corporation as matter of law, in this action Willard utterly failed to prove, as he was bound to do, that, in fact, the disin-

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terested directors and stockholders ever either authorized, or knowingly acquiesced in, these transactions of his. This was necessary to be shown, in order to prove that the company's suit should never have been brought, when its directors became cognizant of the transactions complained of. The proof was that Willard never was authorized to make advances to the Carbon Company and that he made them without the knowledge of the directors; other than Adams, who was interested with him in the matter. Willard was protected against liability to his company, for the reasons stated in our former opinion; (125 N. Y. at p. 81) which applied to his case an exception to that rule which prohibits corporations from engaging in transactions *ultra vires* and subjects corporate officers, committing them to such, to a liability to respond in damages. For the respondent, Willard, it is argued that the former action had no reasonable cause; for the reason that its allegations of an unauthorized indorsement, made without consideration to the company, and of the payment by the company of the indorsed notes and of the consequent loss were all false. They were not. The indorsement was made without authority expressly given; and the fact that the company failed in its action against its officer does not affect the question, for reasons already stated. That the indorsement was made to extend the facilities of the Carbon Company, in supplying goods under its contract, may have been perfectly true; but the contract between the companies did not call for advances of money and whether there was any consideration moving to the Holmes Company was questionable. That may have been Willard's opinion; but it was open to the directors to question and deny the existence of any consideration. The note in question in the other action was, in fact, paid by the Holmes Company, its indorser. It was only in form paid by the Carbon Company, its maker; for, before it became due, the check of the Holmes Company was forwarded and furnished the means wherewith the former company took it up. That the moneys proceeded from the discount of a new note of the Carbon Company does not alter the matter. It was the fact,

too, that, in the end, the \$10,000 advanced to that company were not repaid and the Holmes Company had to take up the renewal notes from the bank. Except in the fact that the plaintiff in the former action mistook the law of the case and did not anticipate the decision of the courts, upon the question of the defendant's legal liability, there was no ground for alleging that its action was without probable cause. Upon that question, of whether a cause of action existed, the company had the advice of respectable counsel, and the directors authorized the suit; relying upon it and in good faith believing the facts to warrant them in holding Willard in damages. It may be observed in this connection, as evidencing their consideration for Willard, that though the president was advised by counsel that the company might proceed against Willard upon the ground of fraud, for a misappropriation of funds, and would be entitled to arrest him, he refused to take a proceeding, which might oppress and disgrace him. The advice of counsel was given with all the facts known to the president; except that it is said the exact mode in which the note was paid by the company, and the explanations of Willard as to the transactions, were not communicated. The respondent's counsel, in his brief upon the evidence, asserts that the attorneys "were perfectly well aware of the true state of facts." But, assuming any doubt in that respect, as to the attorneys' knowledge of all the circumstances, it does not alter this case. The note was paid from the company's funds and Willard's explanation to the directors, while it evidenced his belief that he had been acting in the interests of the company, did not alter the question of his lack of actual authority. The mistake of the attorneys was upon the legal questions.

Without going further into the evidence, we think the plaintiff failed to show that this defendant was without reasonable grounds for the belief that he was liable in damages. There was reasonable ground, in the discovery by the directors of the facts connected with Willard's transactions, upon which to found a genuine belief that a cause of action existed against him and, with the advice of counsel, there was justification for their

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proceeding; in the facts, if not in the law. They were bound to predicate their action upon facts, real, or honestly supposed; but they were not to come under legal condemnation, for not having anticipated the legal conclusion of the court from the facts as proved. In this, as in every such case, the question is not what the actual facts were upon which the action was taken; but what the defendant had reason to believe they were, and if they furnished reasonable cause for instituting the proceeding complained of, its failure is no evidence of want of probable cause or of malice. (*Stewart v. Sonneborn*, 98 U. S. 187; *Fagnan v. Knox*, 66 N. Y. 525; *James v. Phelps*, 11 Ad. & El. 483.) Judge COOLEY, in his work on Torts (p. 181), after referring to definitions of what constitutes probable cause, says "there must be such grounds of belief as would influence the mind of a reasonable person" under like circumstances. "The complainant," he says, "cannot be required to act with the same impartiality and absence of prejudice, in drawing his conclusions as to the guilt of the accused, that a person entirely disinterested would deliberately do." In *Lindsay v. Larned* (17 Mass. 190), it was complained that an action had been commenced to recover upon some promissory notes and the person of the plaintiff had been arrested and his property attached in the province of East Florida; when, at the time, a judgment had been recovered in a suit brought in Massachusetts upon the same notes, wherein an attachment had also issued, and that, because of the action so pending, the Florida suit was dismissed. A non-suit at the Circuit was upheld and in the opinion of the court language was used, which may, not inappropriately, be referred to in connection with this case. Judge PUTNAM said, referring to the defendant's action: "Anxious to recover a considerable debt, he took those measures, and those only, which, under the best advice, he supposed adapted to that purpose, without any apparent desire to harass or vex his debtor. Undoubtedly the present plaintiff has sustained considerable loss, in consequence of the suits which the defendant instituted. But it must not be forgotten, in this part of the case, that the defendant has never to this

day obtained payment of his debt notwithstanding all his exertions. The misfortunes of the plaintiff have arisen from his pecuniary embarrassments, and not from any abuse of the processes of law, to which the defendant had recourse." Although it may be without legal bearing upon the discussion of the question, whether the evidence showed such a want of probable cause as to warrant the submission of the case to the jury upon the question of malice, it is not altogether out of place to observe that this record contains no outward evidence of the existence of malice in the prosecution of the former action. The issue of the attachment was with the purpose of securing the payment of a claim, which the company was supposed to have against the defendant therein; a perfectly legitimate use of a statutory process. Nor should the court be influenced, in determining the question of the defendant's liability to such an action as this, by a consideration of any subsequent statements by its officers, which may have reflected discreditably upon Willard's character or capacity. They may have furnished material for individual suits; but could not help out the cause of action here; which turned solely upon the existence of probable cause for instituting the former suit. It may be further observed that, as matter of fact, the favorable result to this plaintiff in the former action might have been regarded by him as a vindication of his fair fame. Whatever reasons the directors had for the allegations in the complaint against him, in a state of facts which might reasonably operate upon the minds of men of ordinary prudence, the action went against the company and judgment was awarded to this plaintiff upon the issues. He was without justification, in instituting the present action to recover damages for the prosecution by the company of its action, and in re-opening a litigation, which had terminated successfully for him. The result has been to fail in making out any cause of action and to enable the defendant to establish the existence of probable cause for the maintenance of its action against him to recover the amount of the note for \$10,000; upon which he had indorsed the company's name,

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in a matter not within the scope of its legitimate business, and which, now, appears not to have been authorized, or known to the disinterested directors.

The judgment appealed from should be reversed and a new trial ordered: with costs to abide the event.

All concur.

Judgment reversed.

MARY SPENCER, Respondent, v. THE CITIZENS' MUTUAL LIFE
INSURANCE ASSOCIATION, Appellant.

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149	488
142	505
150	580

The burden of proof is upon a defendant to establish an affirmative defense set up in his answer, and this burden is not changed by the presentation of evidence which *prima facie* establishes the defense.

Defendant issued a policy of insurance upon the life of plaintiff's husband; it having lapsed because of non-payment of a premium when due, to procure its re-instatement the insured executed and delivered to defendant an application, dated February 13, 1890, containing a guaranty that he was in sound health, that he had not been sick and had not required the services of a physician since the date of the policy. In an action upon the policy the defense was a breach of said warranty. It appeared that plaintiff in August, 1890, delivered to defendant proofs of the death as required by the policy, consisting of verified answers by plaintiff and the physician who attended the decedent in his last sickness, made to questions propounded by defendant. Both of the affiants stated in substance that the illness of which the insured died began February 6, 1890; he died May seventh of that year. The proofs of loss were presented in August thereafter. Defendant took no action thereon. Subsequently, and before the commencement of the action, supplementary affidavits of plaintiff, the physician and another were served correcting the statement as to when the last illness commenced, stating it to have been February sixteenth, and explaining the mistake, and on the trial the affiants were sworn and their evidence tended to confirm the statements in the last affidavits. The only evidence upon which defendant relied to show breach of warranty was the statements in the original affidavits. The court charged that plaintiff was entitled to recover unless defendant satisfied the jury, by a preponderance of evidence, that the insured was not in good health at the time of re-instatement, and refused to charge that the burden was on the plaintiff to show good health at that time. *Held*, no error; that as the defense was an affirmative issue interposed by defendant the burden was upon it to establish

the same ; that the original affidavits raised no estoppel, but were subject to correction, and so it was for the jury to determine whether the defense was established.

(Argued May 8, 1894 ; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 4, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a policy of insurance issued by defendant upon the life of John L. Spencer, the husband of the plaintiff ; she was named therein as the beneficiary.

It appeared that the decedent failed to pay a premium which became due February 9, 1890, in consequence of which default the policy lapsed. The decedent, in order to renew his policy and induce the defendant to accept the overdue premium, made, and on February 13, 1890, delivered to the defendant a warranty in writing, in the form of an application for re-instatement, in which he declared that he was then in sound health and free from any symptoms of disease, and there was then no condition of his person or occupation tending to impair his health, injure his constitution or shorten his life, and that he had not been sick or required the services of a physician, and that there had been no change in his family history or physical condition since the date of said policy. The defendant thereupon accepted the overdue premium and re-instated the policy.

The defense is that the statements and warranty aforesaid were false and untrue.

The further material facts are stated in the opinion.

Louis C. Whiton for appellant. Inasmuch as the sworn proof of claim of the plaintiff showed facts which absolutely defeated her claim, she should not have been allowed to contradict these statements until she herself had explained her alleged mistake. (*Ins. Co. v. Newton*, 22 Wall. 32.) But

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even conceding that the statements by the claimant in her proofs, accompanied by the statements in the affidavit of the doctor, were not conclusive against her, nevertheless it is perfectly clear that these statements established a *prima facie* case in favor of the defendant, and shifted the burden of proof. (*B. L. T. & S. D. Co. v. K. T. & M. M. A. Assn.*, 126 N. Y. 450; *Tuthill v. U. L. Ins. Assn.*, 56 N. Y. S. R. 226; *Cluff v. M. B. Ins. Co.*, 99 Mass. 317; Best on Ev. § 268; *Seybolt v. N. Y. & E. R. R. Co.*, 95 N. Y. 568.) The application for re-instatement was a warranty, and the contract upon which the lapsed policy of John L. Spencer was re-instated, and the defendant was justified in relying upon the absolute truth of all the declarations contained therein. (*Hallenbeck v. B'nai B'rith*, 54 N. Y. 580; *Smith v. N. B. Assn.*, 123 id. 85.)

Carlton P. Pierce for respondent. The burden on the plaintiff of proving his cause of action, or on the defendant of establishing his affirmative defense, does not shift. (*Lamb v. C. & A. R. R. & T. Co.*, 46 N. Y. 279; *Heinemann v. Heard*, 62 id. 455; *Clafin v. Meyer*, 75 id. 263, 264; *Heilmann v. Lazarus*, 90 id. 506; *Stewart v. Stone*, 127 id. 506.) The warranties in the application for re-instatement, other than that of good health, were surplusage. (*Lovick v. P. L. Assn.*, 21 Ins. L. J. 332; *Dennis v. M. B. Assn.*, 120 N. Y. 496; *Goldschmidt v. M. L. Ins. Co.*, 102 id. 486.) Dr. Westcott was called by plaintiff and examined to prove that Spencer was in good health on February 13, 1890, and as to that matter defendant was allowed to cross-examine him fully. In the course of the cross-examination defendant's counsel asked him about a transaction which occurred more than a year before that date; and then, after he had left the stand, he offered these statements in evidence. This was error. (1 Greenl. on Ev. § 449; *Furst v. S. A. R. Co.*, 72 N. Y. 545; *Morris v. A. A. R. R. Co.*, 116 id. 556, 557; *People v. Greenwall*, 108 id. 301.)

ANDREWS, Ch. J. The insured, John L. Spencer, in his application for re-instatement dated February 13th, 1890, warranted that he was in sound health, and a breach of this warranty was the defense on the trial. The insured died May 7th, 1890. The plaintiff is the widow of the insured and the beneficiary named in the policy. The policy was for \$3,000, and the company bound itself thereby to pay out of the death fund to the plaintiff the said sum "upon acceptance of satisfactory proof at its home office of the death of John L. Spencer during the continuance of the policy." The plaintiff on or about the 13th day of August, 1890, delivered to the defendant proofs of the death of the insured, consisting of verified answers to questions prepared and furnished by the company. One series of questions were answered by the claimant and another by the attending physician of the deceased. In both series the affiants in substance declared in answer to questions upon the point that the illness of which the insured died commenced February 6th, 1890. The physician stated that the immediate cause of death was "acute Bright's disease of the kidneys," and that his sickness commenced with a catarrhal cold. It does not appear that any action was taken by the company on receipt of the proofs delivered on the 13th of August, either by way of acceptance or rejection. Subsequently, in November and before the commencement of the action, supplementary affidavits of the plaintiff, the attending physician and the daughter of the deceased, were served on the company, correcting the statement made in the affidavits previously served and fixing the time when the last illness of the deceased commenced as the 16th of February instead of the 6th of February, the date specified in the former proofs, and explaining the discrepancy. The explanation in substance was that the date in the first instance was fixed by reference to a memorandum of professional visits made by the physician to the family of the deceased, and that the entry of February 7th related to a visit made on account of the illness of the daughter and not of the father, who was then in good health and so remained until February 16th. On the trial the physi-

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cian and the daughter of the deceased were sworn and gave evidence tending to confirm the facts stated in the supplementary affidavits. The plaintiff was not sworn on the trial.

The only point seriously urged for the reversal of the judgment arises upon the claim of the defendant that, under the circumstances, the burden of proof was upon the plaintiff to establish that the insured was in good health on the 13th of February, 1890, when the policy was re-instated. The question is raised by exceptions to refusals to charge and by an exception to the charge made, "that as evidence stands the plaintiff is entitled to recover, unless the defendant satisfies the jury by a fair preponderance of evidence that John L. Spencer was not in good health at the time of the re-instatement, February 13th, 1890." There was no error in the charge or in the refusal to charge that the burden was upon the plaintiff to show that the insured was in good health when the policy was re-instated. The representation made by the insured at that time was a warranty. The answer alleged a breach of the warranty. This was a defense which the defendant was bound to establish to the satisfaction of the jury. It was an affirmative issue interposed by the defendant, and the burden of establishing an issue is upon the party tendering it. The only proof upon which the defendant relied was the admission in the original proofs of loss that the illness of the deceased commenced February 6th, 1890. This was competent evidence in support of the issue, because it was an admission by a party to the record against her interest. But it raised no estoppel. No action had been taken based on the original proofs which changed the situation of the defendant. The original proofs were subject to correction, and the company were advised by the subsequent affidavits of the claim that the date of the first illness in the original proofs was incorrectly given, and that in fact it was subsequent to the re-instatement of the policy, and proof to substantiate the allegation of mistake was given on the trial. It was for the jury to weigh the evidence, the admission on the one side and the proof of the actual fact of the date of the illness in connection with the

explanation of the admission on the other. The burden of proof was not changed by the admission. Unexplained it would have been conclusive, and the defense would have been made out. But when explained it lost its significance, provided the jury accepted the explanation. When the evidence was all in it was for the jury to say whether, upon the whole evidence, the breach of warranty had been established by a preponderance of evidence. The burden of this issue at no time during the trial shifted from the defendant to the plaintiff. What the plaintiff did was simply to prove facts tending to break the force of the fact relied upon by the defendant, and to show that the admission in the original proofs was the result of mistake or misapprehension. It was not necessary that the plaintiff should offer herself as a witness to prove or explain the mistake. It could be established by the testimony of other witnesses. The cases in this court upon the burden of proof, and that it is not changed by evidence which, unexplained, makes out a *prima facie* defense, are conclusive against the point upon which the defendant relies. (*Lamb v. C. & A. R. R., etc., Co.*, 46 N. Y. 279; *Heinemann v. Heard*, 62 id. 455; *Goldschmidt v. Ins. Co.*, 102 id. 486.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

142	510
148	71
142	510
159	505
j 159	506
142	510
d171	1104

MARVIN LANE, as Administrator, etc., Respondent, v. THE TOWN OF HANCOCK, Appellant.

Under the act of 1881 (Chap. 700, Laws of 1881) transferring the primary responsibility for injuries to persons or property resulting from defects in highways from commissioners of highways to the towns, the negligence of the commissioner is still the basis of liability, and a town is now only liable for neglect of its commissioner in a case where he would have been liable had the injury occurred prior to the passage of the act, and where the negligence of the commissioner was such as to render him liable, under the act, to the town for a recovery had against it. To impose the liability it must be shown that the proximate cause of the injury was an omission on the part of the commissioner to use ordinary

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care under all the circumstances in the performance of his duties, *i. e.*, such care as a reasonable and prudent person would ordinarily have exercised under those circumstances.

In an action against a town to recover damages for the death of plaintiff's intestate, alleged to have been caused by a defect in one of its highways, these facts appeared: There are about 280 miles of road in the town, eighty of which are along dugways and up steep ravines. The road where the accident occurred passes through a mountainous wooded section, used mainly for drawing heavy loads of lumber and wood, and for a distance of five miles but two or three families live upon it. The road was built about twenty years previously and was properly constructed; it ran along the side of a steep hill with a retaining wall along the lower side, and on top of the wall, guards consisting of logs about sixteen inches in diameter were placed. The water from a spring on the hillside above was conducted across the road by means of a waterbar and was discharged over the retaining wall. The road at this point, which was at the foot of the hill, was nearly on a level; it had become filled up to the top of the guard, or nearly so; the roadbed was from twelve to fifteen feet wide, and from the upper to the lower side there was a slope of about eighteen inches. The lower wagon track was about four feet from the guards. The road had been in this condition about eight years, and no accident had previously happened. Previous to the accident ice had formed upon the waterbar, and shortly before there had been an extraordinarily severe snow storm. The snow had drifted deeply into the road and was soft from thawing; the lower sleigh track had worn down to a few inches from the guards. The deceased came down the hill on a load of logs on two bobs. The ice and snow caused the rear bob to slide, its lower runner went over the wall, the load was overturned and the deceased killed. *Held*, that the evidence failed to show actionable negligence on the part of the commissioner of highways, and that a refusal to non-suit was error.

Lane v. Town of Hancock (87 Hun, 623), reversed.

(Argued April 19, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Isaac H. Maynard for appellant. The plaintiff's evidence failed to show that the death of the decedent was caused by

the negligence of the highway commissioners; the defendant's liability was, therefore, not established, and its motion to dismiss the complaint and for a non-suit should have been granted. (*Maxim v. Town of Champion*, 50 Hun, 88; *Bryant v. Town of Randolph*, 133 N. Y. 70; *Glazier v. Town of Hebron*, 131 id. 447.) The alleged defect in the road was not the direct cause of the injury. Several other causes were concurrent in producing it. (*Taylor v. City of Yonkers*, 105 N. Y. 202; *Harrington v. City of Buffalo*, 121 id. 147; *Searles v. M. R. Co.*, 101 id. 661.) If there was any defect in the road where this accident occurred it was the duty of the overseer of highways for the district, or the pathmaster, as he is commonly called, to remedy it, and the defendant is not liable for any neglect of duty of that officer. (*McFadden v. Kingsbury*, 11 Wend. 667.) The death of plaintiff's intestate was manifestly due to her own carelessness and neglect. (*Gray v. S. A. R. R. Co.*, 65 N. Y. 561; 6 Wait's Act. & Def. 588, 589; *Reynolds v. C. & H. R. R. Co.*, 58 N. Y. 248; *Munger v. T. R. R. Co.*, 4 id. 349; *Claffin v. Mayor, etc.*, 75 id. 260; *Hall v. Smith*, 78 id. 480; *Wiwirouski v. L. S. & M. S. R. Co.*, 124 id. 420; *Craig v. M. R. R. Co.*, 103 id. 669.) The complaint is defective and wholly insufficient, and fails to state a cause of action, since it contains no allegation or averment that the commissioner of highways of the defendant, the town of Hancock, had been furnished with funds sufficient to repair the highway in question, or had neglected to take necessary and proper steps to procure such funds. (*Eveleigh v. Town of Hounsfield*, 34 Hun, 140; *Bartlett v. Crozier*, 17 Johns. 438; *People v. Adsit*, 2 Hill, 619; *Babcock v. Gifford*, 29 Hun, 186; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hoover v. Barkhoff*, 44 id. 113; *Wright v. Smith*, 23 Barb. 621; *Hutson v. City of N. Y.*, 5 Sandf. 315; *Clapper v. Town of Waterford*, 131 N. Y. 382, 383; *Briant v. Town of Randolph*, 133 id. 75; *Boehn v. Mace*, 45 N. Y. S. R. 285; *Barker v. Loomis*, 6 Hill, 463; *People ex rel. v. Bd. Suprs.*, 93 N. Y. 393; *Hines v. City of Lockport*, 50 id. 236; *Monk v. Town of New*

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Statement of case.

Utrecht, 104 id. 552; *Mandeville v. Reynolds*, 68 id. 528.) The evidence establishes the fact that the commissioners did not have funds, or the power or ability to obtain funds, with which to repair this road. (*Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hoover v. Barkhoff*, 44 id. 113; *Monk v. Town of New Utrecht*, 104 id. 552; *Clapper v. Town of Waterford*, 131 id. 382; *Bryant v. Town of Randolph*, 133 id. 75.) The roadbed and fenders were in the same condition at the time of the accident as when turned over and accepted by the commissioners of highways, and were constructed in accordance with plans and specifications adopted by such commissioners. The defect, if any, in the location and construction of the roadbed, or in the fenders or barriers, was incident to the plan of the road, and constituted simply a defect in the plan of the work arising from an error in judgment as to its necessity. For such error, it is well settled that no liability arises. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67; 97 id. 238; *Monk v. Town of New Utrecht*, 104 id. 522; *Williams v. Grand Rapids*, 59 Mich. 51; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Medina v. Perkins*, 48 Mich. 67.) The court erred in refusing to allow the defendant to show the condition of the roads generally at the time of the accident in that town and vicinity by reason of the "great blizzard" of March twelfth. (*Medina v. Perkins*, 48 Mich. 67; *Evanston v. Gumm*, 99 U. S. 660.) It was error to allow the plaintiff to show that repairs and changes had been made in this road at the point where the accident occurred after the time when the injury complained of was occasioned. (*Corcoran v. Vil. of Peekskill*, 108 N. Y. 636; *Dongan v. Champ. Trans. Co.*, 56 id. 1; *Morrell v. Birdsall*, 22 Wkly. Dig. 530; *Clapper v. Town of Waterford*, 131 N. Y. 389.) It was error for the court to refuse to allow the defendant to produce evidence showing the bias and interest of the witness John S. Hoolihan. (*Shultz v. T. A. R. R. Co.*, 89 N. Y. 242.) The court erred in refusing to allow an answer to the following question to plaintiff's witness Dunn: Did you call the attention of the commissioners to the fact that there was anything that should be done to the road

at that point? (*Pringle v. Woolworth*, 90 N. Y. 502; *McFadden v. Kingsbury*, 11 Wend. 667.)

T. F. Bush for respondent. It is the general rule that the verdict of a jury settles in favor of the prevailing party all of the questions of fact litigated upon the trial. (*Wolf v. G. F. Ins. Co.*, 43 Barb. 400; *Miller v. Lockwood*, 32 N. Y. 293; *Ilyott v. Vil. of Rondout*, 44 Barb. 386; 41 N. Y. 619; *Warren v. Clement*, 24 Hun, 472; *Babcock v. Gifford*, 29 id. 187.) The road was good down to the place of the accident, and the plaintiff's intestate had a right to assume in the absence of notice that it was safe. (*Bidwell v. Town of Murray*, 40 Hun, 195; *Weed v. Vil. of Ballston Spa*, 76 N. Y. 329.) It is not incumbent on the plaintiff to allege or prove funds in the hands of the commissioners of highways. The want of funds or the means to obtain them is a matter of defense. (*Hoover v. Barkhoff*, 44 N. Y. 113, 118; *Heines v. Lockwood*, 50 id. 236, 238, 239; *Lament v. Haight*, 44 How. Pr. 1-4; *Warren v. Clement*, 24 Hun, 472; *Babcock v. Gifford*, 29 id. 189; *Bidwell v. Town of Murray*, 40 id. 190, 196; *Weed v. Vil. of Ballston Spa*, 76 N. Y. 329, 335; *Bryant v. Town of Randolph*, 133 id. 70.) It does not appear that the commissioners of highways of the defendant had made any effort to raise money for the improvement of this road. (*Hoover v. Barkhoff*, 44 N. Y. 113; *Warren v. Clement*, 24 Hun, 472, 474.) The commissioners grossly neglected their duty in not ascertaining the condition of this road at the place of the accident. (*MacVey v. Town of Locke*, 28 N. Y. S. R. 271.) If the court should hold that it was necessary for the plaintiff to show that the commissioners had funds sufficient for the purpose of putting this road in a safe condition it is submitted that the court committed no error in admitting such evidence under subdivision 5 of the complaint. (*Lament v. Haight*, 44 How. Pr. 1.)

O'BRIEN, J. The plaintiff was the husband and is the administrator of Sarah A. Lane, who was killed on the 28th

of March, 1888, by an accident resulting, as is claimed, from a defect in one of the public highways of the town. It is claimed that the defendant is responsible for the damages resulting from the death, and this action was brought to enforce the liability. The plaintiff recovered a verdict for \$1,000 upon which judgment was entered and it has been affirmed at the General Term. By chapter 700 of the Laws of 1881, the primary responsibility for injuries to person or property resulting from defects in the highways was transferred from the commissioner of highways to the town. The negligence of the commissioner is still the basis of the liability, and the town is now liable for his neglect only in the cases where he was liable himself before the statute was enacted. He is still liable over to the town for any judgment recovered against it by reason of his negligence or want of care in the performance of the duties imposed upon him by the statute. So that now, as before, the inquiry is in regard to the conduct of the commissioner and the manner in which he has performed his duties. Actions to recover damages resulting from injuries caused by defects in the public highways are of comparatively modern origin. As late as the case of *Garlinghouse v. Jacobs* (29 N. Y. 297) the whole subject of the liability of the commissioner in such cases was elaborately examined, and it was held that he was not liable under any circumstances. Subsequently the court receded from this position in *Robinson v. Chamberlain* (34 N. Y. 389), and in the case of *Hoover v. Barkhoof* (44 id. 113) the liability of the commissioner for such injuries when resulting from his own negligence was asserted and established. Such actions are now quite common as indicated by the numerous cases to be found in recent reports. (*Ivory v. Town of Deerpark*, 116 N. Y. 476; *Maxim v. Town of Champion*, 50 Hun, 88; 119 N. Y. 476; *Bryant v. Town of Randolph*, 133 id. 70; *Clapper v. Town of Waterford*, 131 id. 388; *Glasier v. Town of Hebron*, Id. 447.) While, in theory, the town is not liable except in cases where the commissioner was or would be liable himself, yet it cannot be doubted that the

practical working of the statute has been to enable parties in some cases to recover verdicts against the town where none would have been rendered against the commissioner personally on the same facts. Although by the second section of the act the commissioner is made liable over to the town for any judgment that it has been compelled to pay in consequence of his misconduct or neglect, yet such actions are seldom if ever brought or if brought are not successful. In reviewing this judgment the liability of the commissioner as it existed before the statute, and as it now exists, when a recovery has been had against the town, must be held to be the true test. The judgment cannot stand unless the facts show or tend to show that the commissioner was guilty of such negligence in the performance of his official duty as would render him liable to the town for the judgment which has been recovered against it. Courts and juridical writers have often attempted to give a comprehensive definition of the term negligence as used in the law. But no definition has yet been given, and it is obvious that none can be given, accurate and comprehensive enough to apply to the varying facts and circumstances of every case. When applied to a commissioner of highways, and for all the purposes of this case it may be defined as the omission on his part to use ordinary care, under all the circumstances, in the performance of the duty imposed upon him by law, which was the proximate cause of the accident resulting in the death of plaintiff's intestate. Ordinary care in its application to this case denotes such care and conduct on the part of the commissioner as a reasonable and prudent person would ordinarily have exercised under the circumstances of the situation. (*Baltimore, etc., R. Co. v. Jones*, 95 U. S. 439.) In order to determine whether in this case the commissioner was guilty of negligence or exercised such care, the whole situation and all the facts and circumstances must be kept in view. There were three commissioners and upwards of two hundred and thirty miles of road, about eighty miles of which was along dugways and up steep ravines. There were one hundred and sixty-nine plank bridges

and several hundred sluices. The road where the accident occurred passed through a mountainous wooded section, and is used mainly for drawing heavy loads of lumber and wood, and but two or three families live upon it for a distance of some five miles. The road had been built more than twenty years before under contract, and accepted by the commissioners, and no claim is made that it was not properly constructed. It ran along the side of a steep hill, with a perpendicular retaining wall from four to six feet high along the lower side, and a dugway bank rising above it at the upper side. A spring of water came out of the hill at the upper side a few rods above the point where the accident occurred, flowed down the hill and was conducted across the road near the foot of the incline diagonally, by means of a waterbar, and discharged over the lower bank and retaining wall. This bar had been constructed about eight years before, and it is not claimed that it was in any respect defective or unsuitable for the purpose for which it was made. On the lower line of the road and over the retaining wall, guards or fenders, consisting of logs sixteen inches in diameter, were placed, leaving space enough for the water that was conducted across the road by the bar to be discharged without accumulating on the bank; but for a space of about twenty-five feet at the point of the accident the road had become filled up with earth, either by the working of the road or the action of water from the hill above, or from the waterbar, so that the surface was raised up to the top of the guard, or nearly so. This change in the surface had neutralized the utility of the logs for that space, at least to a great extent, as guards. The road at this point was from twelve to fifteen feet wide, and there was a slope from the upper to the lower side of about eighteen inches, the lower wagon track being about four feet from the log guards or fenders. The accident occurred at the foot of the hill, where the road was comparatively level. For twenty-five feet above the bar the fall is but one foot five inches, or one foot for every eighteen; and for sixty-eight below the bar the fall is only three feet, or about one in twenty-two.

Twenty feet above the bar the rise is more rapid, being about one foot in seven and a half, for about ten rods. It was not claimed that the commissioners, or any of them, had any actual notice of the defects in the road, if there were any, but the proof tended to show that the road was in this condition for about eight years before the accident, and the verdict was based upon the doctrine of constructive notice. Ice had formed upon the waterbar and upon the surface at the point where it was discharged over the bank caused by the freezing of the water from the spring. A short time before the accident there had been a very severe snow storm, which is familiarly known as the "great blizzard" of that year. On the day of the accident the snow that had drifted into the road over the dugway was deep and soft from recent thawing, and the lower sleigh track on the side of the road had gradually been worn or pushed down to within a few inches of the point where the guards or logs had been placed. This was due to the action of persons driving loaded teams seeking to avoid the deep ruts cut into the snow by the use of lock chains or brakes upon the runners of the sleighs. On the day of the accident the deceased, with the driver of the team, came down the hill to this point upon a load of logs loaded upon two bobs about sixteen feet long. There were three large logs, each about twenty inches in diameter, placed side by side and projecting about eighteen inches beyond the runner, and the upper runner of the hind bob was locked. The driver was sitting alone on the forward end of the logs and the deceased and her companion was seated upon the lower side. At the point where the bar crosses the road, being within a few inches of the bank, the natural slope of the road, the ice and snow upon the bar caused the rear bob to slide down to the edge of the bank, and the soft snow packed at that point gave way and the lower runner worked below the point where the log had been placed. The king bolt connecting the bobs gave way or came out and they became detached, the rear from the forward bobs, which remained in the road, the load was overturned, the driver and the other man jumped

off and escaped injury, but the deceased, incumbered as she was by her clothing, was crushed under the load. I have thus attempted to state the facts and circumstances leading up to the death of the plaintiff's intestate with some detail because they are important in the determination of the question of law. There may be and probably are some shades of difference in the statements of witnesses, but they are not material. The facts stated are substantially undisputed upon the record, and upon the argument there was no real controversy as to the facts established by the evidence. The learned counsel for the plaintiff rested his case upon the proposition that the absence of the log or guard at the place of the accident for the space of about twenty-five feet, due to the circumstances already stated, was the proximate cause of the death, and was evidence tending to prove negligence on the part of the commissioners, which was properly submitted to the jury. The elements which enter into the question of negligence are generally of such a nature as to make it a question of fact. Even where the general facts are not in dispute, as here, but the inference to be drawn from them is not clear and certain, but doubtful, the case must be submitted to the jury. But in every case there is always a preliminary question for the court as to whether there is any evidence upon which a jury could properly find a verdict for the party producing it, and upon whom the burden of proof is imposed. If there is not the court must direct a non-suit or a verdict as the case may require. (*Pleasants v. Fant*, 22 Wall. 116, 120; *Linkhauf et al. v. Lombard*, 137 N. Y. 417; *Hemmens v. Nelson*, 138 id. 517; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47.) So that the practical question in this case is whether the commissioners were guilty of negligence in not observing the fact that a log fender placed upon the edge of this mountain road, passing through the woods, had been removed or had decayed, or its utility destroyed by the accumulation of earth or dirt on the surface from the cause referred to, or by its sinking below the roadbed from any other cause. Could a jury reasonably find that such a defect in the road for the time mentioned, without actual notice, was

actionable negligence under all the circumstances of the case? The town was divided into numerous road districts, over each of which an overseer was appointed under the law whose duty it was to keep the roads in repair. The country roads in this state are maintained by local assessments upon the property owners in the district either in labor or money, and the direction of the work is committed by the statute to the overseer. The commissioners have, of course, supervisory charge, and while it may be that the neglect of the overseer might not excuse them, yet, in determining the question of their negligence, the general system for the care of the highways contained in the statute must be considered. To keep all the roads in a large town under constant personal inspection is altogether impracticable, and necessarily the commissioners must place some reliance upon the care and vigilance of the local overseers in the several districts. Then the extent of the town, the character of the country, the climate and the danger of accidents from the elements must be considered. Giving due weight to all these elements entering into the problem can it fairly be said in this case, conceding that the absence of the fender was the proximate cause of the accident, that the commissioners were guilty of such negligence as to render them personally liable before the statute and now liable over to the town for this judgment. If so it is difficult to imagine any case where an accident on a country highway occurs resulting in death or personal injury that they would not be equally liable, and this reasoning, carried to its necessary and logical result, must prevent any prudent man from accepting the office of commissioner of highways in any town of the state, unless at the peril of financial ruin. The judgment in this case implies a measure of duty and liability upon commissioners of highways far beyond anything contemplated when the statute was passed, and beyond what it ought to be in reason or justice. These officers are a part of the system of town government in this state. Their compensation is small, in some towns almost nominal. It was never intended that they should be obliged to devote their whole time to the

care of the roads in the town, and if they did they would not be able to prevent all accidents. No accident had ever occurred on this road before, and there was nothing to indicate that such an accident as this would be likely to occur. There was such a combination of circumstances, all concurring at the time to produce it, that no reasonable man could impute negligence to the commissioners because they did not foresee it in the absent guard or fender on the edge of the road. It would be exacting from a commissioner of highways such a degree of vigilance and foresight as would be impossible for the average man chosen to perform the duties of that office reasonably to attain. Such an accident followed by such results is so rare and unlikely to happen that it would be unreasonable to impute negligence to any one simply because he failed to foresee and guard against it. The limit of duty on the part of a town with regard to the condition of its highways falls far short of making them absolutely safe, under all circumstances, even for those who use them properly. (*Hubbell v. City of Yonkers*, 104 N. Y. 434; *Glasier v. Town of Hebron*, 131 id. 447; *Moak v. Town of New Utrecht*, 104 id. 552; *Clapper v. Town of Waterford*, 131 id. 382; *Wilson v. Town of Granby*, 47 Conn. 59.)

The remarks of Judge PECKHAM in the case of *Hubbell v. City of Yonkers* (*supra*) apply with great force to the facts disclosed by this record. "That which never happened before, and which in its character is such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence, in not foreseeing its possible happening and guarding against that remote contingency."

It is not an unfair test of liability in this case to keep always in view the possible liability of the commissioners to the town in case it is obliged to pay the judgment. Are the commissioners who were elected a few weeks before this accident liable, or are their predecessors during the time that the road at the point of the accident was in the condition described, or are they all liable? None of them had any actual notice of the

defect, but the verdict of the jury indicates that all of them should have known that the log was absent. Although the jury have found that the town was liable solely through the negligence of the commissioners, it is not certain that even the same jury upon the same facts, in an action by the town against the commissioners, to reimburse itself for the loss occasioned by such negligence, would reach the same conclusion. It is obvious that unless the provision of the statute making the commissioner liable over to the town for his negligence in such cases is to remain a dead letter, as it probably has, one view of duty may be taken in actions by injured parties against the town, and quite a different view in actions by the town against the commissioners, whereas, in both cases the conduct of the commissioners should be measured by the same standard. We think that this is a case where the town could never be able to recover against the commissioners upon the facts disclosed by the record, and that a recovery ought not to be had, and, for the same reason, no recovery should be had by the plaintiff against the town. The proof was not sufficient to charge the commissioners with personal negligence in the performance of the duties imposed upon them by law, and the motion for a non-suit at the close of the case should have been granted. The verdict was extremely moderate in amount. Indeed it is out of all proportion to the unfortunate results of the accident if the defendant was liable at all. If no other interests were to be affected save that of the parties to the action, the verdict would have no significance beyond an expression of sympathy for the family of the deceased, in which, as individuals, we all share. The case, however, involves a principle of great public importance, far-reaching in its operation and effect, which must be determined by the application of settled rules of law.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except BARTLETT, J., not voting.

Judgment reversed.

In the Matter of the Application of ANDREW D. BAIRD et al.,
Relators, Appellants, for a Writ of Mandamus to G. COCH-
RANE BROOME et al., Supervisors, etc.. Respondents.

The board of supervisors of a county entitled to more than one member of assembly, in making an apportionment of assembly districts, are entitled to the exercise of a reasonable discretion.

As under the constitutional limitations forbidding the division of towns in making such an apportionment and requiring each district to be of convenient and contiguous territory, absolute equality of population in the districts is not possible, a slight variation will not warrant or justify an application to the courts for redress. To authorize this there must be a grave, palpable and unreasonable deviation, so that when the facts are presented, argument will not be necessary to show that such a deviation has been intentionally made.

The constitutional prohibition against the division of towns in making the apportionment does not apply to wards of a city. A ward, although treated as a town for some purposes of municipal government, is not a town within the meaning of said prohibition, and so, a ward may be divided.

A writ of mandamus having been granted setting aside an apportionment made by the board of supervisors of the county of Kings,* and directing a new apportionment, said board re-convened and made such apportionment. On application for an alias writ, it appeared that if the county was so divided that each district would contain the same number of inhabitants, each of the eighteen districts the county was entitled to would contain 54,877 people. Eleven of the districts, as apportioned, contained a population ranging from 53,000 to 58,000; the others contained the following population respectively: 61,263, 60,808, 60,381, 58,550, 50,393, 49,197, 48,944. *Held*, that the deviations were not so great as to justify the interference of the courts; that the apportionment did not, upon the face of the record, indicate such a manifest abuse of discretion as to amount to an evasion or disobedience of the former decision.

The Constitution does not require the districts to be made up of compact territory, and the fact that districts in a city are irregular in form does not establish any actual inconvenience.

Reported below, 75 Hun, 545.

(Argued May 2, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12,

* *In re Baird* (138 N. Y. 95).

1894, which affirmed an order of Special Term denying an application for a writ of mandamus.

On May 19, 1893, the petitioners procured a writ of mandamus to the supervisors of Kings county, which directed them "to divide the said county of Kings into eighteen assembly districts, each of which shall consist of convenient and contiguous territory and each of which shall be made equal as to population so far as that is attainable, while making each district of convenient and contiguous territory and keeping the towns of said county undivided." On June 9, 1893, the board of supervisors met and made an apportionment. The relators then moved for an order "deciding and determining that the supervisors have not obeyed the order and writ, and that they have failed to divide the county into assembly districts, etc., and directing that another or alias writ be issued * * * commanding them to do and perform as commanded by the writ heretofore issued * * * and commanding them in such terms and with fuller directions that shall state that the division like or similar to the one made and returned by them as aforesaid, is not the division they are commanded to make, and that such writ contain such other and further directions as to the court may seem meet and agreeable to the rules and practice," etc., which motion was denied.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellant. The grave inequality in the certified populations of the eighteen districts presents a clear violation of the order and writ of the court, and a failure to comply with a constitutional obligation. Such inequality, of itself, made necessary an alias writ. (Const. N. Y. § 5; Laws of 1892, p. 5, § 3; Laws of 1891, p. 442, § 3.) The districts do not consist of convenient and contiguous territory. (*Baird v. Bd. Suprs.*, 138 N. Y. 105; *In re Thirty-fourth Street*, 102 id. 343, 350; *People v. Carpenter*, 24 id. 86, 89; *Supervisors v. Ellis*, 59 id. 620; *Parker v. Bd. Suprs.*, 106 id. 392, 410.) The relators present as error the fact that the total of the certified population of the eighteen assembly districts

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was about 4,500 (it should have been about 3,500) less than the actual population, according to the census tables that they were bound to use. (Laws of 1891, p. 442, § 3.)

Almet F. Jenks for respondents. The appellant urges that the defendants have divided wards. The relators claim that these wards are towns, the division of which is forbidden, both by the express language of the Constitution and the mandate of the court. This is untenable. (138 N. Y. 100; *Dillon on Mun. Corp.* § 184; *In re Gertman*, 109 N. Y. 170; *Warren v. Mayor, etc.*, 2 Gray, 84.) The argument of the appellants, that the districts are not equal as to population, so far as that is attainable, while making each district of convenient and contiguous territory and keeping the county towns undivided, is not sustainable. (*People ex rel. v. Rice*, 135 N. Y. 503.) The districts consist of convenient and contiguous territory. (Laws of 1892, chap. 680, § 8; Laws of 1891, chap. 236, § 3.) Even if the relators could divide the whole county into districts better than those made, as they have not done or even attempted so far, they have not made out a case. (*Baird's Case*, 138 N. Y. 114.) The apportionment was valid. (Const. N. Y. art. 3, § 5.)

O'BRIEN, J. When this case was here on a former appeal (*Baird v. Supervisors*, 138 N. Y. 95) we held that the board of supervisors of the county of Kings were required by the Constitution, when apportioning the assembly districts for the election of members of assembly from that county, to make the division equal as to population, as far as that was reasonably attainable, while making each district of convenient and contiguous territory and keeping the towns undivided. It was not claimed in defense of the apportionment then before us that there had been any attempt to comply with this rule. The legal question then presented to the court was whether the Constitution imposed any such restriction upon the board when dividing the county into assembly districts. The board have since made another division of which the relators complain, but there is no dispute as to the principle that should

govern in the performance of that duty, or as to the requirements of the Constitution. The only question that is now before us is whether our former decision has been in fact obeyed, and whether the present apportionment was made in such a way as to present any question of law reviewable by this court. In the former decision it was admitted that a large measure of discretion was necessarily left with the board in dividing the county into districts for the election of members of assembly. The duty which the board had to perform was to divide the territory within the boundaries of the county into eighteen assembly districts, each of equal population, as near as may be, while forming each of convenient and contiguous territory, and keeping the four towns in the county undivided. When the population of the county, returned by the census, is divided by eighteen, the number of members assigned to the county by the act of the legislature, it is found that if each district was formed so as to include exactly the same number of inhabitants, it would contain 54,877 people. But under the constitutional limitations forbidding the division of towns, and requiring convenience and contiguity of territory in the formation of the districts, absolute equality of population is not possible, and this is admitted by the learned counsel for the relators. The present apportionment, made under the command of the writ issued after the former judgment of this court, has so divided the county that eleven of the eighteen districts contain each a population ranging between 53,000 and 58,000. Three of the remaining districts contain the following population respectively, 61,263, 60,808, 60,381. Three others contain 50,393, 49,197, 48,944, and the other district 58,550. The relators, contending that the writ had not been obeyed, applied to this court for an alias writ, and the motion was denied and this order affirmed at General Term. The appeal raises the question how far this court can interfere with the action of public bodies in the discharge of ministerial duties involving the exercise of discretion. Upon the former appeal the nature and limits of that power, when applied to the duty of a board of supervisors

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creating legislative districts under the mandate of the Constitution, were stated in this language: "We do not intend by this decision to hold that every trifling deviation from equality of population would justify or warrant an application to a court for redress. Such, we think, is not the meaning of the provision. It must be a grave, palpable and unreasonable deviation from the standard, so that when the facts are presented argument would not be necessary to convince a fair man that very great and wholly unnecessary inequality has been intentionally provided for. This is as near an exact definition of the meaning of this section in this regard as I am able to now give."

The court is again asked to interfere on two grounds: (1) That the division has not been made in such a way as to secure equality of population among the districts as near as may be. (2) That at least one of the districts, though made up of contiguous territory, has not been formed with reference to convenience as required by the Constitution. This is the 16th district composed of two towns and a part of three wards of Brooklyn. The learned counsel for the relators has printed and placed upon his points a map of this district side by side with one of that famous district in Massachusetts credited to Governor Gerry which introduced a word of somewhat odious signification into the language. The district is certainly irregular in form though there is nothing to show that it is inconvenient. The comparison is liable to be quite misleading. A shoestring district cut across the state of Massachusetts eighty years ago embracing the sparsely peopled regions of that state might well be said to be inconvenient, while a district of irregular form in the densely populated parts of a great city of to-day would not be. The Constitution does not require the districts to be made up of compact territory. When the Constitution of 1846 was framed the idea of convenient territory and the integrity of towns in the formation of legislative divisions referred principally if not wholly to the rural parts of the state where the population was scattered. It did not forbid the division of wards in cities nor

was it supposed that any great inconvenience could result from the formation of districts of irregular shape in the great cities as they exist to-day. Indeed, it is quite conceivable that assembly districts in New York and Brooklyn might be so irregular in form as to present an unfavorable appearance when mapped upon paper, but which would in fact be more convenient when laid out with reference to streets, blocks and election districts than if they were compact and regular. The difficulties of intercourse between different sections of a large county, which were present to the minds of the framers of the Constitution in that day have been largely overcome by modern means of communication, and, if they ever existed, they have entirely disappeared in the great cities of the state. The record discloses no ground for judicial interference with the action of the board on account of any actual inconvenience or difficulty arising from the territorial form of any of the districts. The only ground of complaint, if any exists, is the inequality of population. The learned counsel for the relators has attempted to show how this could and should have been avoided and how a division could have been made which would make the population of each district more nearly equal. It is quite possible that he could have made a more equitable division of the population. It is quite likely that the courts could have made a better apportionment than the one now before us. But neither the courts nor the counsel have been intrusted with this power or duty by the Constitution. This division of the county of Kings into assembly districts is the product of many minds and not of one mind. It is what the board finally agreed upon. Each member may have had views of his own with reference to his locality. These conflicting views and local demands, always clamorous in such a body, had to be reconciled. It was the duty of the members to agree upon some plan of division reasonably fair and just, and it was perhaps impossible to formulate one that would be mathematically accurate. In the nature of things much must be left to the discretion of the board, the members of which come from every ward and town of the county. The remarks

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of the learned judge who gave the opinion of this court in another case where the action of the legislature in the formation of senate districts was under review are applicable: "Certain districts may be picked out from the whole number and compared with certain others, and inequality be charged against them. But when all the counties in the state are to be arranged, and brought into connection upon some plan in which the express commands of the Constitution as to contiguous territory and county lines are to be observed, it will pass the wit of man to make such an alteration of the senate districts for this state that may not be the subject of adverse criticism, and of alleged possible improvement." (*People ex rel. Carter v. Rice*, 135 N. Y. 473.)

The board had the same difficulties to meet in the formation of assembly districts that the legislature had in the formation of senate districts. I do not think that the present apportionment is of such a character as to justify the interference of the courts within the principle laid down in the former appeal. It may not be, and probably is not, an ideal one. But it was made by the body having the power and discretion under the Constitution for that purpose. It adopted no erroneous rule or principle of action as it did in making the first apportionment. The objection to the result grows out of the exercise of the discretion which, it must be conceded, the board possesses. The Supreme Court in the locality has examined its action and refused to interfere. The order of the court below was right unless legislative apportionments are to be made, in the end, by the courts instead of the legislature and the local boards appointed for that purpose. The great and principal function of this court is to review questions of law passed upon by inferior courts or arising from the action of ministerial or governmental bodies, and not to revise official action involving the exercise of discretion. If this apportionment does not, upon the face of the record, indicate such a manifest abuse of discretion as virtually to amount to an evasion or disobedience of our former decision, then the court cannot interfere or set it aside without drawing to itself powers which

have been confided by the Constitution to other departments of the government. The power of the court to compel local boards of apportionment to perform the duty imposed upon them by the Constitution was asserted on the former appeal, and nothing more need now be added to what was then decided. The record now before us does not disclose such an abuse of discretion as to justify judicial interference. There is inequality of population in the districts as formed, but not to such an extent or in such a degree as to warrant us in holding as matter of law that the board has abused its powers or refused to exercise its discretion. It does not seem to me that all the criticism of the learned counsel for the relators upon the action of the board is well founded. The division of a great county containing a million of people or more into assembly districts in such a way that one-half the members of assembly were elected by each of the two great political parties at the last election, as was admitted upon the argument, cannot be so essentially and plainly vicious as to justify an appeal to the courts. If the one hundred and twenty-eight members composing the assembly could be based upon constituencies without any greater inequality in population than exists in the eighteen districts of Kings it would, I think, be regarded as a reasonably fair distribution of power. But, as already observed, the question here is not whether the division is the best that could have been made, but whether the board had jurisdiction and proceeded according to legal rules. If so, the courts cannot require them to undo the work on account of errors, mistakes or inequalities resulting from the exercise of their discretionary powers, and to perform it in some other way, without assuming governmental powers with which they have not been intrusted by the Constitution or the laws. The Constitution forbids the division of towns, but not the division of wards in the formation of assembly districts. The town is a municipal division of the state of very ancient origin. The wards into which cities are divided have no resemblance to it unless it be in the circumstance that they are represented in the board of supervisors. The indivisibility of wards in the crea-

tion of assembly districts cannot be implied from the provision against dividing towns. A ward is not a town, though it may be treated as a town for some purposes of municipal government. The framers of the Constitution, in prohibiting the division of towns, had no intention to include the wards of a city within the provision. If they had, they would have said so. Hence, the board did not transcend its powers by dividing wards in the formation of the districts.

The order appealed from should be affirmed.

All concur.

Order affirmed.

In the Matter of the Application of CHARLES S. WHITNEY et al., Relators, Appellants, for a Writ of Mandamus to GEORGE KUNKEL et al., Supervisors of the County of Kings, Respondents.

The fact that in making an apportionment of a county into assembly districts it was not based upon the citizen population, but aliens were included, does not necessarily require that the apportionment should be set aside for that error. The court will not presume a material disproportion in the distribution of aliens throughout the county.

In proceedings by mandamus to compel the board of supervisors of Kings county to re-convene and make a new apportionment of the county into assembly districts on the ground that the apportionment made was not based on the citizen population, excluding aliens, but that aliens were included, it appeared that the apportionment first made was set aside in proceedings by mandamus as violative of the Constitution, unequal and vicious, and a new apportionment ordered. In making the original apportionment the same error was made, *i. e.*, including aliens, but no objection was taken on that account in the first proceedings. Another apportionment (the one here complained of) was then made. The proof tended to show that the distribution of aliens through the districts formed was in a proportion varying so little from that of the citizen population that the same apportionment might properly have been made had it been based upon the citizen population alone. *Held*, that under the circumstances and as no appreciable harm had resulted from the error complained of, a second judicial interference was not required.

Reported below, 75 Hun, 581.

(Argued May 2, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1894, which affirmed an order of Special Term denying a motion for a writ of mandamus.

The relators applied for a mandamus directed to the board of supervisors of the county of Kings, requiring it to convene and divide said county into assembly districts, claiming that an apportionment heretofore made should be set aside on the ground that the population upon which it was based included aliens.

The facts, so far as material, are stated in the opinion.

Jesse Johnson for appellants. It was and is the duty of the defendants to divide the county into eighteen assembly districts as nearly equal in citizen population as is attainable. (Const. N. Y. art. 3, § 5.)

Almet F. Jenks for respondents. The writ of mandamus is not always granted as of right, and whether it shall issue frequently rests in the discretion of the court. This motion was denied by the court in the exercise of its sound discretion. (*People ex rel. v. Assessors*, 137 N. Y. 204; *People ex rel. v. Common Council*, 73 id. 56, 63; *People ex rel. v. Chapin*, 104 id. 96, 102; *People ex rel. v. Preston*, 62 Hun, 185; 131 N. Y. 644; *People ex rel. v. Rice*, 135 id. 473; *Gormley v. Day*, 114 Ill. 185, 189; *Merrill on Mandamus*, §§ 66, 74; *People v. Hatch*, 33 Ill. 9, 134; 137 N. Y. 204; *Reg. v. Griffiths*, 5 B. & Ald. 731, 735; *Shortt on Informations*, 246; *Reg. v. Pembrokehire*, 2 B. & Ad. 391; High Ex. Leg. Rem. § 14; *North v. Board*, 27 N. E. Rep. 54; *People v. Tremain*, 17 How. Pr. 142.) Appeal does not lie to this court. (*In re Sage*, 70 N. Y. 220; *People v. Ferris*, 76 id. 326; *People v. Campbell*, 72 id. 496; *People ex rel. v. Joralemon*, 139 id. 16.)

FINCH, J. It appears to be conceded on all sides that the apportionment of Kings county into assembly districts should have been based upon the citizen population and have

excluded aliens. That is undoubtedly the correct rule, and the return admits that it was not observed. It does not necessarily follow, however, that the apportionment made should be set aside for that error. If no appreciable harm has resulted from adopting the wrong measure of population as a basis for the division made we ought not to grant a mandamus to compel a change, at least, under circumstances such as exist in the present case. An apportionment was first made in 1892. It was unequal and vicious on its face; a palpable violation of the constitutional provision, and of a character subversive of all true principles of government, and which cannot be too severely condemned; but that apportionment was also based upon the population swollen by the inclusion of aliens. No objection was taken on that account. The question was not raised, and our order for a new apportionment consequently made no allusion to the subject and gave no direction about it. (138 N. Y. 96.) The supervisors then proceeded to make a new apportionment, which, on the relation of *Baird*, we have just upheld. It is not a perfect one by any means. The relator claims that considerations of political advantage still infect the work done, and that the problem has been how much of partisan injustice this court would feel itself bound to bear. But the division has seemed to us a reasonable approach to equality, and under all the circumstances of the case a substantial obedience to the writ. Some discretion we are bound to concede to the apportioning board, and we have already determined in the *Baird* case that such discretion has not been so abused or exceeded as to require a second judicial interference. Having once ordered a new apportionment with no complaint made as to the selected basis of population, and that order having been obeyed, we ought not now to intervene on the new ground asserted unless we can clearly see that the error established did, in fact, make the apportionment much more unequal than it appeared to be upon the basis adopted. In *People ex rel. Carter v. Rice* (135 N. Y. 473) it was alleged as a ground of attack upon the senate districts that persons of color not taxed

were included in the representative population, and we held that unless the class wrongly included were shown to be located in seriously different proportions in the different districts, the error was harmless and should not occupy the time of the court. We cannot presume a material disproportion in the distribution of aliens, and the proof given in this case tends to show that their distribution through the districts formed is in a proportion quite near to the citizen population, and varying so little from it that the same and an identical apportionment with that now before us might be made, based upon the citizen population alone, and we should feel bound to permit it to stand. And so we think that the error relied upon does not furnish a sufficient reason for setting aside the apportionment.

The order should be affirmed.

All concur.

Order affirmed.

WILLIAM H. WEAVER, Respondent, v. WILLIAM W. HAVILAND. Individually and as Administrator, etc., Appellant.

The right of a creditor to bring an action to set aside a fraudulent transfer of property made by his debtor, does not accrue until the recovery of a judgment against the debtor and the return of an execution thereon unsatisfied. Until that time, therefore, the Statute of Limitations does not begin to run against such a cause of action. (Code Civ. Pro. § 380.)

The provision of the Code of Civil Procedure declaring that in "an action to procure a judgment, other than a sum of money, on the ground of fraud * * * the cause of action * * * is not deemed to have accrued until the discovery * * * of the facts constituting the fraud," does not make the time of the discovery of the fraud in such a transfer the time of the accruing of the right of action by the creditor, in a case where the fraud was known before the creditor had established his claim by judgment. It simply provides for a class of cases where the right of action was perfect, but the fraud was not until thereafter discovered.

P. sold and assigned a mortgage on lands in Michigan to F., plaintiff's assignor, for the sum of \$2,600, which sum she falsely represented was due and unpaid thereon, when in fact the amount was but \$2,100. F.

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brought an action in Michigan against P. to recover back the excess, and recovered judgment. In 1881, and shortly after that recovery, P. transferred her property to defendant, and delivered to him the money received for the assignment, without consideration, and for the purpose of placing her property beyond the reach of creditors. An action was brought here upon the Michigan judgment, and judgment recovered against P. in 1886, upon which execution was issued and returned unsatisfied. In this action, brought within six years thereafter, to set aside the fraudulent transfer to the defendant, *held*, that the action was not barred by the Statute of Limitations; also, that the fact that an action for money had and received might have been maintained by F. against defendant to recover the amount overpaid, immediately after the money came to his hands, and that this cause of action was barred by the statute, did not affect the result here, as the two causes of action were entirely distinct, and the present one was in no way dependent upon the other.

Reported below, 68 Hun, 376.

(Submitted May 8, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Backenstose & Keyes for appellant. The Statute of Limitations is a bar to this action. (Code Civ. Pro. § 382; *Roberts v. Ely*, 113 N. Y. 128; *Chapman v. Forbes*, 123 id. 532; *Mills v. Mills*, 115 id. 80; *Morris v. Budlong*, 78 id. 558; *Root v. French*, 13 Wend. 570.)

Reed & Shutt for respondent. The Statute of Limitations is not a bar to this action. (Code Civ. Pro. §§ 1871, 1872, 1879, 3343; *Bayard v. Hoffman*, 31 Hun, 256; *Eyre v. Beebe*, 28 How. Pr. 333; *Gates v. Andrews*, 37 N. Y. 657; *Baldwin v. Martin*, 35 id. 101; Buswell on Limitations, § 131.) The Statute of Limitations is an affirmative defense and must be pleaded. (*Miner v. Beekman*, 50 N. Y. 337;

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14 Abb. [N. C.] 1; 1 Abb. [N. S.] 147; 1 J. & S. 67; 3 id. 102.)

ANDREWS, Ch. J. This is a judgment creditor's action, and the only defense relied upon at the trial was the Statute of Limitations. The action was commenced Feby. 13th, 1892. It appears from the pleadings that Phebe Haviland, mother of the defendant, took under the will of her husband, who died Sept. 17th, 1878, the use of his real estate and the income of his personal property for life. His real estate consisted of a house and lot in Geneva, in this state, and he held a mortgage on lands in Michigan, executed by Henry S. Weaver and wife. On the 13th day of April, 1880, Phebe Haviland, as executor of her husband's will, she then being in the state of Michigan, sold and assigned the mortgage to one Fish for the sum of \$2,600, falsely representing to Fish that that sum was due and unpaid thereon, whereas in fact there was due and unpaid only the sum of \$2,100. Fish, upon ascertaining the fact, commenced an action in the courts of Michigan against Phebe Haviland to recover back the sum paid in excess of the amount due on the mortgage, and on June 9th, 1881, recovered a judgment against her in the action. An action on this judgment was subsequently brought in the Supreme Court of this state January 28th, 1886, and judgment was recovered thereon against Phebe Haviland March 9th, 1886, for \$667.47, and execution thereon was issued and returned unsatisfied. Phebe Haviland, at the time of the death of her husband and ever thereafter, was a resident of the state of New York. It is found that shortly before the recovery of the Michigan judgment, and on or about June 2d, 1881, Phebe Haviland conveyed to the defendant William W. Haviland her life estate in the house and lot, and gave to him the moneys received by her from Fish on the transfer of the mortgage, without consideration, and for the purpose of placing her property out of her hands, so that the same could not be reached upon a judgment in the action. Phebe Haviland died intestate Aug. 2d, 1888. This action is brought to reach the interest of Phebe

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Haviland in the property so fraudulently transferred to the defendant. There is another fact disclosed by the evidence as to which there is no finding, but which is deemed important by the counsel for the defendant, viz., that the money paid on the mortgage by Fish was at the time received by the defendant, and was retained by him as his own, with the consent of Phebe Haviland. But if this finding had been made the evidence would have justified the further finding that the defendant assumed to act in the transaction as the agent of his mother, and that Fish supposed he was so acting, and had no information, until the examination of the defendant in supplementary proceedings shortly before the bringing of this action, that the money had been retained by him.

The limitation of time for bringing actions in the nature of a creditor's bill to set aside a conveyance or transfer made by the judgment debtor in fraud of creditors is prescribed by section 382 of the Code of Civil Procedure. By the fifth subdivision of that section a creditor's action must be commenced within six years "after the cause of action has accrued." Such an action is to procure a judgment "other than for a sum of money on the ground of fraud in a case which on the 31st day of December, 1846, was cognizable by the Court of Chancery." The words "other than for a sum of money" in subdivision 5 included those cases in which equitable relief is required, although as part of the ultimate relief a money judgment is also demanded. (*Carr v. Thompson*, 87 N. Y. 160.) Unless, therefore, the right of action to set aside the fraudulent transfer from Phebe Haviland to the defendant accrued to the plaintiff more than six years prior to February 13th, 1892, the day of the commencement of the action, the action was not barred. The right of Fish to bring an action to set aside the transfer did not accrue until he had recovered a judgment in this state against Phebe Haviland and the return of an execution unsatisfied. Until his claim against Phebe Haviland had ripened into a judgment he stood as a general creditor merely and was not in a situation to assail the transfer to the defendant. The authorities upon this point are numerous and decis-

ive. (*Reubens v. Joel*, 13 N. Y. 488; *Dunlevy v. Tailmadge*, 32 id. 457; *Geery v. Geery*, 63 id. 252; *Adsit v. Butler*, 87 id. 585.) The time when the fraud was committed is not the period from which the limitation is to be computed, but the time when the plaintiff had acquired a standing to assail it. The present action was commenced within six years after Fish had recovered his judgment here. The defendant, in the absence of fraud or collusion, cannot question the validity of the claim upon which it was rendered, and he acquired no immunity from pursuit because of the time which intervened between the fraudulent transaction and the rendition of the judgment. (*Decker v. Decker*, 108 N. Y. 128.) The clause in sub. 5, sec. 382, following the clause above quoted, "the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under which he claims of the facts constituting the fraud," does not help the defendant. This clause was added to enlarge the time for bringing the action beyond the six years in the case specified. It was not intended to make the date of the discovery of the fraud the time of the accruing of the right of action in cases where the fraud was known, but the plaintiff had not established his claim by judgment. The clause was inserted to provide for a class of cases where the right of action was perfect, but the fraud had not been discovered until a subsequent period. (*Gates v. Andrews*, 37 N. Y. 657.) It is, however, a sufficient answer to the claim based on this clause of sub. 5 that there is no evidence or finding that the plaintiff or his assignor, Fish, had any notice of the fraudulent transfer until shortly before the commencement of the action.

The further claim is made that a cause of action for money had and received could have been maintained by Fish against the defendant to recover the overpayment on the mortgage, immediately after the money came to his hands, he having received and retained it without consideration, and that this cause of action was barred by the lapse of six years and before this action was brought. The defendant may be right in his

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contention. (*Roberts v. Ely*, 113 N. Y. 128.) But assuming this to be true the present action is not based on an original liability of the defendant arising from his connection with the sale of the mortgage. The plaintiff's assignor did not elect to proceed against the defendant upon this liability. He brought his action against Phebe Haviland, the principal in the transaction, and on recovering judgment against her brought this action based upon that judgment, to charge the defendant on account of his fraudulent dealings with her to the prejudice of her creditors. The cause of action is entirely distinct from the cause of action against him for money had and received, and is in no way dependent upon his original relation to the transfer of the mortgage or the recovery had thereon. He is called upon to answer for the property of Phebe Haviland, received by him in fraud of her creditors. Whether he was connected with the original fraud in the sale of the mortgage is wholly immaterial in the present action, except as it may reflect upon his fraudulent intent in his subsequent dealings with Phebe Haviland.

We think the defense of the Statute of Limitations failed and the judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed. _____

WILLIAM B. GRIFFIN, Appellant, v. J. HYLER WHITE, as
Survivor, etc., Respondent.

Plaintiff, being the owner of a patented device, to be used in the manufacture of wagons, entered into an agreement with the firm of J. & W., of which firm defendant is the surviving partner, by which he granted to that firm the right to use the device upon all wagons made by it, and to grant licenses to others to use it, the firm to pay him one dollar and twenty-five cents for each wagon made and sold, and one-fourth of the amount received for licenses granted. Some time after the execution of the contract said firm began the manufacture of "gears," in the first place for the purpose of advertising its wagons. These gears were gradually introduced to the trade, and sold by the firm to dealers as a separate article; each cost about \$8 and were sold for \$9; the wagons were sold at prices ranging from \$100 to \$200. In an action upon the contract

plaintiff claimed that the gears were to be treated as wagons, and that he was entitled to the agreed royalty for each one sold. *Held*, untenable; also that the manufacture and sale of the gears was not included in the right to grant licenses, and so plaintiff was not entitled to one-fourth of the receipts; but that such a use of the patented article was not provided for or granted by the contract, and as plaintiff had consented to the use he could not claim an infringement of his patent, but was simply entitled to recover the reasonable value of such use.

(Argued April 25, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the November term, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit without a jury.

This was an action upon a contract made between plaintiff and the firm of Joubert & White of which firm defendant is the surviving partner.

The provisions of the contract and the facts, so far as material, are stated in the opinion.

Esek Cowen for appellant. The construction of the contract claimed by defendant would make it unreasonable. (*Russell v. Allerton*, 108 N. Y. 288.) If a party sells a part of an invention with intent that the purchasers shall supply the remainder, such sale is an infringement. (*Travers v. Beyer*, 23 Blatchf. 424; *Wallace v. Holmes*, 9 id. 65.) In the construction of a contract the court may look to antecedents and surrounding facts and circumstances to ascertain its meaning. (*Blossom v. Griffin*, 13 N. Y. 569; *Griffiths v. Hardenburgh*, 41 id. 464; *Field v. Mason*, 47 id. 221; *Dodge v. Gardner*, 31 id. 239; *Kester v. Reynolds*, 6 Hun, 626; *Beachan v. Eckford*, 2 Sandf. Ch. 116; *Dwight v. G. I. Ins. Co.* 103 N. Y. 341; 6 Hun, 477; 69 N. Y. 113; 65 id. 111; *Woolsey v. Funke*, 121 id. 93; *Nicoll v. Sands*, 131 id. 19-24.)

A. J. Cherritree for respondent.

O'BRIEN, J. The plaintiff is the assignee of a contract made by his assignor, one Knapp, on the 9th of March, 1881, with a firm of which the defendant is the surviving member. The original parties to the contract each owned a patented device or improvement to be used in the manufacture of buck-board wagons. It was claimed that one of the devices was an infringement upon the other, which claim resulted in litigation between them, which was settled by the execution of the contract. This settlement and agreement combined both patents and their use in the defendant and his partner, they stipulating to pay to the plaintiff's assignor certain specified sums as royalties for the use of the patent, which had been granted to him and which he owned. The following are the material provisions of the contract:

"*First.* The said parties of the second part are hereby authorized to sell rights and territory under each of said patents, and they agree to use their best endeavors to do so with all convenient speed.

"*Second.* The parties of the second part are to pay all the expenses of traveling, selling, advertising and all other expenses connected with the granting of licenses or making sales under said patents or either of them, and pay over to said Knapp one-fourth of all sums received for such sales or licenses.

"*Third.* Upon all wagons made by the parties of the second part or by them and their associates, the said Knapp is to be paid by them \$1.25 for each wagon made and sold. All payments to be made to said Knapp every three months.

"*Fourth.* The said parties of the second part shall have the exclusive right to manage said patents and grant licenses, and they are authorized to sign the name of said Knapp to deeds or licenses for that purpose.

"*Fifth.* This contract shall cover all improvements hereafter made to such wagons, no matter which party shall make the improvement."

This contract conferred upon the defendant's firm the right to use the patent of the other party and the use contemplated was thus classified:

1. The right to grant licenses to other individuals or firms to use the patent in their business and to license its use within particular territory. In such cases it was the interest of the licensor to make the best bargain that he could and to obtain as large a fee as possible, but whatever revenue was received from that source, one-fourth of the amount was to be paid to the patentee.

2. The defendant's firm were also manufacturers of this grade of wagons and desired to use the patent in their business, and they agreed to account and pay over to the patentee for this use of the improvement a fixed sum, namely, \$1.25 for each wagon made and sold by them. The parties evidently supposed when the contract was made that this classification would cover every possible use to which the defendant's firm could apply the patent and every source from which revenue could be derived. But, some time after the execution of the contract, the defendant prepared some gears for the purpose of advertising the wagon to which the improvement covered by the patent was attached. The gear was composed of two slats or bands attached to four wooden cross-bars with boards, with side steel springs, and two other wooden bars detached from each other. From their use as a means of advertising the completed wagon they were gradually introduced into the trade as a separate article and in that form sold to dealers for about \$9 each, while the completed wagon with the patent improvement was sold by the defendant on the market at prices ranging from \$100 to \$200 each, according to style and finish. Since June 1, 1891, the defendant's firm made and sold four hundred gears, and the question in this case is whether they are to be treated as wagons upon which the plaintiff is to be paid \$1.25 each or as embraced within the other provision of the contract. The learned trial judge held that the manufacture and sale of such gears by the defendant was a proper and reasonable exercise of the power conferred by the contract to grant rights and licenses for the use of the patent in combination with parts of a wagon and the plaintiff was entitled to receive one-fourth of the sum actually received

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by the defendant for the right to use the patent in that way. This amount he determined by ascertaining the cost of the material and labor in the construction of the article and adding to the same a reasonable trade profit and deducting such sum from the price for which the gear sold in the market. In this way the value of the use of the patent was found to be one dollar on each gear, one-fourth of which he awarded to the plaintiff, who insists that he was entitled to have the gear counted as a wagon and royalties paid in the same way as if they had all been used upon completed wagons made and sold. For all completed wagons made and sold and all territorial or other licenses granted to the defendant he has fully accounted and paid the plaintiff or his assignor, according to the terms of the contract, and thus the controversy is reduced to a comparatively small sum, the amount of which must depend upon the construction which should be given to the contract, keeping in view the terms which the parties employed to express their meaning, and all the surrounding circumstances. We think it is quite plain that it was not the intention of the parties that the same royalty should be paid for the use of the patented improvement when used upon a completed wagon, selling at a price from \$100 to \$200, and a gear, selling at \$9. Presumptively the royalty was fixed with some reference to the price which the article brought to which it was attached and became a part. The value of the improvement depended upon the extent that it would enhance the selling price of the article of which it formed a part, and it is quite plain that its use did not affect the value of the gear in the same way or in the same proportion that it did the value of a wagon. It enhanced the profit which the manufacturer made upon a wagon quite largely, while it did not have the same effect upon the profit realized from the sale of a gear. The licensee could not afford to pay the same price for the use of the invention upon a gear, selling for \$9 and costing \$8, as he could for its use upon a wagon selling for \$200. He agreed to pay a fixed sum for the use when applied to a wagon, but a gear is not a wagon, it is only a part of a wagon. The contention of the

learned counsel for the plaintiff must, therefore, find support, if at all, outside the terms of the agreement to pay a specified sum on each wagon made and sold. Nor do we think that the parties ever intended by their agreement to permit the defendant to license himself to use the invention upon a gear as a single article for the trade, and so we are unable to adopt either the theory of the court below or that of the plaintiff's counsel. It is quite plain, we think, that the invention was applied to a purpose not covered by the terms of the contract and not within the contemplation of the parties when it was made. At that time its use for such purpose was unknown, but was developed subsequently, and both parties are now struggling to make the contract fit a state of things not thought of or in the minds of the parties when it was made. But while the use of the invention upon the gear was outside of the contract, it was not an infringement upon the rights of the patentee or the owner, since he consented to such use. The defendant's firm reported to him from time to time the number of gears upon which it was used, and they recognized their obligation to pay for such use, and the course of business was such as to leave no doubt about the fact that the plaintiff's assignor consented to the use of the invention in this way and expected the defendant to pay him for it. The only point upon which they differed, or rather upon which their minds never met, was the measure of compensation, and that was never settled, one party claiming that it was governed by the clause providing for a fixed sum upon a wagon, and the other that the case came within the clause providing for payment of one-fourth the license fees. The case then is one where the defendant's firm has used the patented invention with the consent and permission of the patentee, without any express agreement as to the royalty or compensation to be paid to him for such use, and, hence, the plaintiff was entitled to recover the reasonable value of such use whatever it is. We will not now attempt to ascertain whether such value is more or less than the amount awarded him by the judgment nor to point out the method by which it is to be determined.

In our view the learned court below in measuring the damages applied an erroneous principle, since it was held that the case came within that part of the contract which secured to the owner of the patent one-fourth of the license fees which the defendant received or became entitled to for territorial or individual licenses. The construction of the contract that we have adopted is perfectly just to both parties. The plaintiff, or the owner of the patent, is at liberty to terminate the present arrangement which has grown up from the course of business, and by notice or otherwise withdraw his consent to any further use of the invention upon gears, as a single article for the trade. If after the consent, express or implied, by the patentee to the use of the invention in this way has been withdrawn or terminated, the defendant should still continue such use, he would be liable as for an infringement or an unauthorized use of the invention. It is still open to both parties, if they so desire, to amend the contract or make a new one in such terms as to expressly authorize the use of the patent for the purposes in which the present controversy originated, upon such terms and conditions as they may be able to agree upon.

The judgment must, therefore, be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed. _____

WILLIAM T. LONG, Appellant, v. WILLIAM LONG, Respondent.

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Aside from the statute providing for the sale of real estate of which a person died seized, for the payment of his debts, there is no general power in the court to direct a sale for that purpose, or to direct the proceeds of a sale made by order of the court for other purposes to be applied in such payment.

When resort to the real estate of a decedent for the payment of his debts is sought by his creditors, the prescribed statutory proceedings must be strictly pursued.

It seems, that when real estate devised or descended is sought to be charged with the debts of the deceased, the validity and existence of the debt is open to contest by the devisees or heirs; they are not concluded by a

decree of the surrogate on the accounting of the personal representatives, and except in case of a judgment on the merits, such a decree is not even *prima facie* evidence against them.

The provisions of the Code of Civil Procedure (§ 2606) in reference to an accounting by an executor, or administrator of a deceased executor, administrator or testamentary trustee, as to the trust property, do not apply to a special guardian appointed in proceedings for the sale of the real estate of infants.

The surrogate has no jurisdiction of proceedings to require such a special guardian to account, but the power lies in the court from which he derived his appointment.

While it may be, as a general rule, that a surety upon the official bond of a special guardian, appointed to sell the real estate of an infant, is not liable until the remedies against his principal are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends, the infant will not be compelled to resort to it before bringing suit upon the bond.

A special guardian appointed to sell certain real estate devised to two infants, subject to a legacy, executed a bond to each infant for the faithful performance of his trust. Defendant was one of the sureties on one of the bonds. The guardian sold the real estate and paid the legacy from the proceeds. Defendant had presented a claim against the estate, which was disputed and referred under the statute, and he had recovered judgment thereon. The special guardian, without any order or direction of the court, paid over to defendant the balance of the purchase money to apply upon this judgment. Said guardian never rendered any account to the court of his proceedings and was never discharged from the trust. He died intestate, as did also the other surety. The estates of both were administered and distributed. Defendant was a son of the decedent and was the devisee of the residuary real estate of the latter, of which there was a large amount. In an action upon said bond, *held*, that the payment so made by the special guardian was unlawful, in violation of his trust, and a breach of the condition of the bond for which the surety was liable; that defendant's judgment was not a lien upon the lands devised to the infants, and was enforceable only in the regular course of administration; that if the personalty was insufficient to pay the debts, after it was exhausted, the residuary real estate was primarily chargeable, and in the absence of proof or findings showing beyond question that some definite sum of money necessary for the payment of the debts must necessarily become in the end a charge upon the lands devised to the infants, there was no equitable ground for a defense or basis for an allowance to defendant.

Also *held*, that under the circumstances, an accounting in the court having jurisdiction of the guardianship was not necessary before bringing suit on the bond.

After the infants became of age they made an indorsement upon the account rendered to the surrogate by their general guardian, in which they expressed themselves satisfied therewith. In said account there was no reference to the fund in question here, and no part of it ever came to the hands of the general guardian. *Held*, that this was not a ratification of the disposition made of said fund; also, that the fact that the infants were represented by special guardian in proceedings for the settlement of the accounts of the administrator of the estate of the special guardian, appointed for the sale of the real estate, did not ratify the misappropriation, it not appearing that said accounts referred to or contained any information as to the disposition made of the purchase money.

The ratification of an unauthorized act to be binding must be by a competent person, with knowledge of all the facts, and of their legal bearing upon his rights.

Long v. Long (65 Hun, 595), reversed.

(Argued April 24, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which reversed a judgment in favor of plaintiff entered upon the report of a referee and granted a new trial.

This action was brought upon a bond given by Duncan MacIntyre, as special guardian for the plaintiff, then an infant, in proceedings instituted in the Supreme Court for the sale of plaintiff's real estate, such bond being executed by MacIntyre as principal, and William Long, defendant, and George W. Root as sureties.

The facts, so far as material, are stated in the opinion.

J. B. Adams for appellant. As the record does not show that the reversal by the General Term was made upon questions of fact, this court has only to inquire whether there was any error of law in the judgment so entered, upon the facts found by the referee. (*Davis v. Leopold*, 87 N. Y. 620; *Weyer v. Beach*, 79 id. 409; *R. L. R. Co. v. Roach*, 97 id. 378; *Peck v. Goodberlette*, 109 id. 180; Code Civ. Pro. § 1338; *Thompson v. Bank of B. N. A.*, 82 N. Y. 7; *Douglass v. Ferris*, 138 id. 192.) The General Term erred as to each and

every assumption of fact outside the referee's report, and the conclusion of law based upon such assumptions was necessarily erroneous. (*Hogan v. Kavanaugh*, 138 N. Y. 417; *O'Flynn v. Powers*, 136 id. 412; *Kingsland v. Murray*, 133 id. 170; *Stillwell v. Swarthout*, 81 id. 109; *Selover v. Coe*, 63 id. 438; 2 R. S. 100, § 1; *Clark v. Sheldon*, 134 N. Y. 333; *In re McClure*, 135 id. 238; *Harris v. Ely*, 7 Paige, 421.) The special guardian and his surety can justify the guardian's disposition of the proceeds of the sale only when made as directed by an order of the court, and such an order is authorized by the statute only when made so as to secure such proceeds for the benefit of the infants. (2 R. S. 191, § 179; *Hunt v. Hunt*, 58 N. Y. 666; *Ellwood v. Northrup*, 106 id. 172.) The judgment directed by the referee was warranted by the facts found, and was in accordance with law, and the defendant's exception to the referee's conclusion of law was not well taken. (*Smith v. Holmes*, 19 N. Y. 271; *Nanz v. Oakley*, 122 id. 631; *Douglass v. Ferris*, 138 id. 192, 204; *Rima v. R. I. Works*, 120 id. 433.) The necessity for an order or adjudication by the court upon the guardian's account continued in any case only during the disability of infancy of the party for whose benefit and protection the bond was taken. (*Foreman v. Marsh*, 11 N. Y. 544, 552; *Brown v. Snell*, 57 id. 286.) There was no request or exception to refusal to find, as a conclusion either of law or of fact, that the plaintiff had ever ratified or confirmed the misappropriation or conversion of the trust funds by his special guardian; and, therefore, there is no question whatever of ratification or confirmation before this court on this appeal. (*Adams v. Brimmer*, 74 N. Y. 553; *Glenn v. Garth*, 133 id. 18; *Hamlin v. Sears*, 82 id. 331; *Jackson v. Burchin*, 14 Johns. 124; *Jackson v. Carpenter*, 11 id. 539.)

John B. Abbott for respondent. This court should uphold the findings of fact and determination of equities made by the General Term of the Supreme Court. (*Martine v. Lowenstein*, 68 N. Y. 456.) Plaintiff's complaint does not allege facts sufficient to constitute a cause of action against this

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defendant. (*Perkins v. Strinnet*, 114 N. Y. 359; Code Civ. Pro. § 2606.) If the court shall find as fact that the moneys received by said special guardian in said proceedings were the same moneys paid defendant to satisfy the incumbrances upon the land of the plaintiff and his sister, to wit, the judgment and legacies set out in the petition and report of the referee in the proceeding, such disposition of the funds was not only lawful and proper, but said plaintiffs severally have ratified and confirmed such judgment. (*Loder v. Hatfield*, 71 N. Y. 92; *Bushnell v. Carpenter*, 92 id. 270.)

O'BRIEN, J. The General Term has reversed the judgment entered upon the report of the referee in favor of the plaintiff in this case. It does not appear that the reversal was upon the facts, and we must, therefore, assume that the decision was upon the law, applied to the facts settled by the report of the referee. The judgment was based upon facts as to which there was really no controversy. In December, 1866, Holloway Long, the plaintiff's grandfather, died, leaving a will which was duly admitted to probate. He devised to the plaintiff and his sister, children of his deceased son, as tenants in common, the undivided one-half part of a farm containing 328 acres, of which he died seized. In the month of February, 1868, the plaintiff and his sister, being infants, by their general guardian, presented a petition to the Supreme Court for authority to sell this real estate. An order was entered in the proceeding appointing the general guardian special guardian for the purpose of selling the land, and their interest in it, upon his executing a bond to each of the infants in the penalty of \$5,000, conditioned for the faithful performance by the special guardian of his trust, and for compliance with the orders of the court in respect to the proceeds of the sale. On the 22d of February, 1868, the special guardian with the defendant and another person, now deceased, executed the bond in the form and manner prescribed by the order and the rules of the court. It was approved by the county judge and filed, and thereupon the guardian entered upon the per-

formance of his duties as such. Subsequently the guardian, by direction of the court, conveyed the infants' interest in the land to a purchaser. The following are the words of the condition in the bond: "The condition of this obligation is such, that if the above-bounden Duncan MacIntyre shall faithfully perform the trust reposed in him as the guardian of the above-named infant for the purpose of selling and disposing of certain real estate belonging to said infant, and shall pay over, invest and account for all moneys, and securities received by him as such guardian as aforesaid, according to the order of any court having authority to give directions in the premises, and shall observe and obey all orders and directions of any such court in relation to the said trust, then this obligation to be void, otherwise to remain in full force and virtue."

The purchaser paid to the special guardian as the consideration for the conveyance to him of the interest of both children in the real estate the sum of \$9,150. The interest of the infants was subject to a legacy of \$4,000 bequeathed by the testator to his widow. The guardian paid this from the proceeds of the sale, and no question is made as to the validity or propriety of this payment. The defendant was a son of the testator, and was named in the will as sole executor, but he renounced the office and subsequently administrators with the will annexed were appointed. He then filed with them, as such, a claim against his father's estate, which was disputed and referred as a disputed claim under the statute. The referee reported in favor of the claim and judgment was entered upon the report in favor of the claimant for \$10,245 on the 14th of December, 1867. There is some dispute as to the regularity of this judgment, it being claimed on the part of the plaintiff that it was entered without confirmation of the report by the court or any other direction save the report of the referee appointed by the surrogate. We will assume, however, that the judgment was not void and that the defects or irregularities in the record, if any, are not now material. The special guardian paid the balance of the purchase money received by him for the interest of the infants

in the real estate devised to them by the will to the defendant upon this judgment, without any order or direction of the court, and this was found by the learned referee to be a misappropriation by the guardian of the funds, for which his sureties are responsible. The guardian never rendered any account to the court of his proceedings, and was never regularly discharged from the obligations of his trust. He died intestate in 1871 and his estate was administered and distributed in the year 1875. The other surety died in the year 1881, intestate, and his estate has also been administered and distributed. Prior to the commencement of this action the court, upon the plaintiff's petition, directed that the bond be prosecuted. The referee directed a judgment for the plaintiff for the amount of the penalty specified in the bond. The opinion of the learned General Term indicates that the reversal proceeded upon the theory that though the payment of the fund to the defendant was irregular and in violation of the rules of the court, yet the infants had the benefit of the payment, since it went to extinguish a claim or lien against their property, and hence the plaintiff was not equitably entitled to recover. It is plain from the discussion that it was assumed the court could have ordered the guardian to pay the money in his hands upon the judgment and that such an order would have been made had he applied for it, and that as there was nothing wanting to complete the authority to dispose of the fund in that way except such an order, equity would now regard as done that which would have been done had an application for that purpose been made. The conclusion of the learned court below depends upon two propositions in neither of which can we concur: (1) That the court would or could have authorized the guardian to pay the money on the judgment. (2) That the infants received the benefit of such payment. The court had no power to direct the fund in the guardian's hands to be applied to a purpose for which it could not direct the land to be sold in the first instance. The judgment was not a lien upon the land. It was not a judgment against the testator in his lifetime nor against his devisees, but against the adminis-

trators of his estate. It could have been enforced only in the regular course of administration. The personal property was the primary fund for its payment, and the real estate of which the testator died seized, in the hands of his heirs or devisees, was not liable to be sold for the payment of the debt until the personal estate had been exhausted, and not then without complying with the statutory proceedings for that purpose in the Surrogate's Court. Aside from the statute there was no general power in the court to direct the lands of which the testator died seized, or the proceeds in the hands of the guardian, to be applied to the payment of debts. (*Hogan v. Kavanaugh*, 138 N. Y. 417; *O'Flynn v. Powers*, 136 id. 412; *Kingsland v. Murray*, 133 id. 170.) The judgment, whether valid or not, added nothing to the force of the claim as a charge upon lands. The most that could be claimed for it is that it was *prima facie* evidence of a debt. When real estate devised or descended is sought to be charged with the debts of the deceased, the validity and existence of the debts are open to contest by the heirs or devisees in the proceeding, and the decree of the surrogate on the accounting does not conclude them, and except in the case of a judgment on the merits, is not even *prima facie* evidence of the existence of the debt. (*O'Flynn v. Powers*, *supra*.) The personal estate must first be accounted for and applied; the other lands devised are also equally chargeable; the Statute of Limitations or any other legal defense to the claims is available to the heirs or devisees and the land cannot be sold or its proceeds applied until a valid debt is established in the proceeding. These familiar rules make it impossible to say with any degree of certainty that the judgment or claim upon which the fund in question was applied, or any specific part of it, could ever have been charged upon the land in such a way as to authorize a sale. The residuary real estate, which seems to have been large, was devised to the defendant. That was chargeable with the debts of the deceased after the personal estate had been exhausted and in the regular course of administration. The liability of the interest of the infants in

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the land devised to them to be sold for the satisfaction of the debts of the deceased, was subject to so many conditions and depended upon so many contingencies that, when invoked as a justification for the disposition made of the fund arising from the sale it seems to me to be entirely unsafe and unreliable. In the absence of proof or finding showing beyond all question that some definite sum of money necessary for the payment of the debts of the testator, must necessarily become in the end a charge upon the lands devised to the plaintiff and his sister there was no equitable basis for disturbing the conclusion of the learned referee. I am unable to see how such proof was possible in this case or how it can be made in any case resting upon the same or similar facts, and hence the necessity of the rule which requires the creditors of a deceased person to pursue strictly the statutory proceedings whenever resort must be had to the real estate for the payment of debts. The general rule is that the sureties upon official bonds of this character are not liable until the remedies against the principal have been exhausted and the extent of the liability ascertained by an accounting in the proper court. The provisions of § 2606 of the Code do not seem to apply to a special guardian for the sale of the real estate of infants. The Surrogate's Court has no jurisdiction of such a proceeding, and the guardian should be required to account before the court from which he derived his appointment. In this case the guardian could have been required to account to the Supreme Court. Whenever a statute requires an accounting by the principal, or his personal representatives, as a preliminary condition to the maintenance of an action upon the official bond, it must, of course, be complied with. But no statute is cited which in terms applies to this case. The application is by way of analogy. In an action upon the bond of a special guardian for the sale of real estate, special circumstances may appear which would render such an accounting wholly unnecessary, and then it may be dispensed with. When it can be seen that an accounting cannot possibly change the facts upon which the liability of the

sureties depend, the infant should not be compelled to resort to a proceeding which is practically useless. In this case no accounting could make a single material fact any clearer than it now is. The guardian received the money and paid it over to the defendant. He died intestate more than twenty years before the commencement of this action. His estate derived no benefit from the misappropriation. It was administered and distributed more than fifteen years before. If the guardian and the other surety were still alive, in an action upon the bond, the whole liability in equity would, as between themselves, fall upon the defendant, for the reason that he received the money, and the misconduct of the guardian was for his benefit. In view of these special circumstances, I think the learned referee was right in holding that an accounting in the court having jurisdiction of the guardianship was not necessary, since the extent of the liability of the sureties upon the bond had been otherwise as definitely determined as it could be by an accounting. (*Girvin v. Hickman*, 21 Hun, 316; *Brown v. Snell*, 57 N. Y. 286.) It appears that after the infants became of age they made an indorsement upon the account rendered to the surrogate by their mother, as their general guardian, in which they expressed themselves satisfied with the account. It is urged that such action on their part ratified what had been done with the fund arising from the sale of the real estate. There is no ground for this contention. The account of the general guardian contained no reference to the fund in question. No part of it ever came to her hands, and of course her accounts could not embrace it, and the surrogate had no jurisdiction over it. The infants, before coming of age, were represented by special guardian in proceedings before the surrogate for the settlement of the accounts of the administrators of Holloway Long, and in like proceedings for the settlement of the accounts of the administrators of the special guardian for the sale of the real estate. Their presence upon the record as parties to these proceedings could not ratify the misappropriation. Aside from the fact that they were then incapable of ratifying, it does not appear that these

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accounts could or did inform them of the disposition made of the money from the land. The ratification of an unauthorized act must be by some competent person, with knowledge of all the facts and of their legal bearing upon his rights.

The judgment of the General Term should be reversed and that entered upon the report of the referee affirmed, with costs.

All concur.

Judgment accordingly.

JOHN E. BLACKMAN, Appellant, v. ELSWORTH L. STRIKER et al., Respondents.

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An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language he is entitled to the benefit of the doubt.

A deed must be held to convey all the interest the grantor has in the land, unless the intent to pass a less interest appears by express terms, or is necessarily implied from the terms of the grant.

Prior to 1782 the heirs of J. who, as such, were tenants in common of a farm, which was within the corporate limits of the city of New York, entered into an agreement for the purpose of partitioning the same, pursuant to which the farm was divided into parcels, one of these contained a family burying ground lot. One parcel was allotted to each of the tenants in common, and partition deeds were executed. The agreement provided that the burying ground lot should remain and continue the family burying ground, and whoever of the tenants in common should take the parcel containing the same, and should thereafter sell, should reserve said lot in the deed to the purchaser for the purpose specified, "with full liberty to pass and repass as occasion shall require." In 1782 M., one of the tenants in common to whom said parcel was allotted, conveyed the same by deed to another party to the agreement, which deed contained a clause "saving, excepting and reserving" to the heirs of J. the burying ground lot, "with free ingress, egress and egress into, out of and from the same, to bury the dead, etc., forever." No burials were made in the lot after 1840. Said parcel remained intact until 1885, when it was divided, and immediately thereafter the owner of the portion containing the burying ground took possession, removed the remains of the dead buried there, and proceeded to erect a building. In 1889 the heirs of M. conveyed to plaintiff all their right, title and interest in and to the lands of which J. died seized. In an action of ejectment to recover said burying ground lot, held, that

M. intended to and did convey the fee of the parcel allotted to him subject only to an easement in said lot for burial purposes; that, therefore, plaintiff failed to show a legal title, and was not entitled to recover.

(Argued April 20, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 28, 1892, which denied a motion by plaintiff for a new trial, overruled his exceptions and directed judgment in favor of defendants upon the verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Hoadly for appellant. Plaintiff is entitled to a judgment of reversal and to recover the possession of the property upon a new trial, unless the exception in the deed of Matthew Hopper to John Hopper (the younger) failed to take effect as such. (*Munn v. Morrall*, 53 N. Y. 44; *Benson v. M. Bank*, 20 Penn. St. 370; *Corning v. T. I. & N. Factory*, 40 N. Y. 191; *Marvin v. B. I. M. Co.*, 55 id. 549; 1 Greenl. on Ev. §§ 141-143.) The deeds to plaintiff are not void for champerty. (*Crary v. Goodman*, 22 N. Y. 170; *Danziger v. Boyd*, 120 id. 628; *Sands v. Hughes*, 53 id. 295; *Pearce v. Moore*, 114 id. 259; *Brown v. Bigne*, 21 Oreg. 260; *Wynehamer v. People*, 13 N. Y. 378; *Bartemeyer v. Iowa*, 18 Wall. 129; *Forster v. Scott*, 139 N. Y. 577.)

George Bliss for respondents. Plaintiff must recover, if he recover at all, on the strength of his own title. He can take nothing from alleged defects in defendant's title. (*Roberts v. Baumgarten*, 110 N. Y. 380; *Sweet v. B., N. Y. & P. R. Co.*, 79 id. 293.) Whether we take the language of the agreement of the heirs or that of Matthew Hopper's deed, there is nothing more than a conveyance of the fee of the property subject to a right of burial; an easement. (*Grafton v. Moir*, 130 N. Y. 470; *Provost v. Calder*, 2 Wend. 517, 523; *Dygert v. Matthews*, 11 id. 35; *Thompson v. Gregory*, 4

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Johns. 81; *Pollock v. Cronin*, 12 How. Pr. 363; *Bridges v. Pierson*, 45 N. Y. 603; *Walrath v. Redfield*, 18 id. 457; *Hornbeck v. Westbrook*, 9 Johns. 73; *Ives v. Van Auken*, 34 Barb. 566.) The deeds under which plaintiff claims are absolutely void under the Champerty Act (1 R. S. 739, § 147). (*Crary v. Goodman*, 22 N. Y. 170; *Pierce v. Moore*, 114 id. 256; *Becker v. Church*, 115 id. 562; *Church v. Schoonmaker*, 115 id. 390; *Dawley v. Brown*, 79 id. 570; *Livingston v. P. I. Co.*, 9 Wend. 513; *Christie v. Gage*, 71 N. Y. 189; *Whitney v. Wright*, 15 Wend. 172; *Jackson v. Elston*, 12 Johns. 452.) The plaintiff presented no evidence by which he could obtain a judgment in ejectment, for he did not define the *locus in quo* in such manner that it could be described or that possession of it could be given by the sheriff. (*Drew v. Swift*, 46 N. Y. 207; *Wendell v. Jackson*, 8 Wend. 183; *Jackson v. Camp*, 1 Con. 605.) This court has no jurisdiction of this case, and should dismiss the appeal. (Code Civ. Pro. § 1339; *Reinmiller v. Skidmore*, 59 N. Y. 861; *Cowenhoven v. Ball*, 118 id. 231; *People v. Featherly*, 131 id. 597.)

O'BRIEN, J. This was an action to recover real property. The trial court directed a verdict for the defendants and the General Term has affirmed the judgment entered on the verdict. The land which is the subject of the controversy is particularly described in the complaint, and is situated at the corner of Ninth avenue and Fiftieth street, in the city of New York. John Hopper the elder, who died in the year 1778, is the common source of title. He was the owner of a farm, in what is termed in his will and in subsequent conveyances, the Out Ward of the city of New York, which he devised to his five children and the descendants of a deceased child. The will directed that after his decease the farm should be divided into six equal portions by competent and disinterested persons, after having made a survey and chart of the farm and the several divisions. The parcels thus surveyed and mapped were to be so arranged, with reference to value, as to make all as

nearly equal as possible, and then the devisees were to determine by lot which parcel should belong to each in severalty. This was to be done by numbering the six parcels on the map and placing each number upon a ticket. and, in the language of the will, each devisee was to "draw one ticket, and the number thereon should be the number of the lot he or she shall inherit by the devise." The drawing was to be done under the direction of the executors of the will. The children of the deceased child were entitled to draw and hold as tenants in common one of the lots so numbered. On the 4th of February, 1782, the devisees, including the guardian of the minor grandchildren, entered into an agreement in writing under seal, whereby it was agreed that the farm should be divided into lots on the east and west side of the Bloomingdale road, which ran through the property, that is to say, six parcels on each side of the road, and it then provided that a parcel on the east and one on the west side should be matched and represented by a number on the map, and consequently by a single ticket at the drawing. The parcel which was designated on the map as lot No. 2 contained the family burying ground, a small plot surrounded by a fence, the area of which, for the purpose of this case, may be stated as about forty feet in width and eighty feet in length. This burial plot is supposed to be the identical land in controversy, and parcel No. 2, upon which it was located, was drawn by and allotted to Matthew Hopper, one of the sons. After the division and allotment of the six parcels between the devisees partition deeds were executed and delivered by all the parties in interest to four of the devisees, in which the parcel so conveyed is described in each case, but the record does not show that any deed was ever executed to Matthew Hopper or to the minor grandchildren. Whether this results from the fact that no such deed was ever in fact executed, or that the conveyances, if made, have been lost without record does not appear. The absence of any proof of the execution and delivery of such deeds is not, I think, material on the question of title. The heirs of John Hopper the elder took title in severalty to their respective allotments of

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his estate by force of the devise to each contained in the will, the making of the map or chart directed by the testator, the execution of the agreement for the partition or division directed by the will, and the result of the drawing whereby each of the six shares were specifically described and located upon the farm. The evidence tended to prove, if it did not actually establish the fact, that the title and possession of that portion of the farm upon which the burying ground was located passed to Matthew under his father's will. On the 17th of February, 1782, Matthew Hopper and wife conveyed by deed, with full covenants, to his brother John Hopper the younger, the parcel which had been assigned to him, it being described in this deed by metes and bounds, and by reference to the partition map or chart, where it was designated as lot No. 2. This deed, however, contained the following clause, which is the foundation of this action. After describing the land and enumerating all appurtenances, actual or reputed, this language is used: "Saving, excepting and reserving unto the heirs of the said John Hopper of the Out Ward, deceased, and to their and each of their heirs out of this present demise, all that certain burying ground now in fence consisting of forty-eight feet square parcel of the said lott of ground and commonly called the family burying ground, with free ingress, egress and re-gress into, out of and from the same to bury the dead, &c., forever."

The plaintiff claims that under this clause the fee in the burying ground remained in Matthew Hopper and descended to his heirs, who have conveyed to the plaintiff, while the defendant claims that the fee passed to John Hopper the younger, by the deed, subject to an easement for burial purposes, and to the defendant, one of his descendants. John Hopper the younger, grantee in this deed, died in the year 1819, having disposed of all his property by will. This parcel remained intact down to the year 1885, though no burials were made in the plot subsequent to the year 1840. The defendant is one of the descendants of John Hopper the younger, and in an action of partition brought in 1885, a parcel of land, which

included the burial plot, was assigned and allotted to him by the report of the commissioners and the judgment in the action. Immediately after this partition the defendant took possession of the land in question, removed the remains of the dead buried there, and the fence, and proceeded to erect an expensive building on the ground. The will of Matthew Hopper was admitted to probate September 25, 1784. There is nothing in it to indicate that he supposed he had, at the time of executing the will, which was the same year in which it was admitted to probate, any interest in the land in question. He made no reference to it either by specific devise or general clause, and if he had any interest after the deed to his brother, he died intestate as to such interest. In the year 1889 his heirs conveyed to the plaintiff all the right, title and interest in and to all lands which John Hopper the elder died seized or possessed of in 1778, or which he devised by his will. The vital point in the plaintiff's case is involved in the construction which should be given to the clause in the deed from Matthew to John Hopper, since he cannot succeed in the action unless it be held that the fee in the burial lot remained in the grantor and did not pass to the grantee. The learned counsel for the plaintiff contends that by the language of the deed the burial lot was expressly excepted from the operation of the grant and did not pass. It must be admitted that if the solution of this question depended entirely upon the language of the clause quoted, it would be very difficult to answer his argument. A conveyance of land, like all other instruments, should be so construed as to effectuate the intention of the parties to be ascertained from the language and all the surrounding circumstances. (*Thayer v. Finton*, 108 N. Y. 394; *Beach v. Crain*, 2 id. 86-93.) An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language, he should have the benefit of the doubt or the ambiguity. They should be taken most strongly and construed most strictly against the grantor whose words they are and against him who stands in his place, and if an advantage can be gained from an uncer-

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tainty or ambiguity in the words, the grantee or person standing in his place is entitled to the benefit of it. (*Grafton v. Moir*, 130 N. Y. 470; *Jackson v. Hudson*, 3 John. 375; *Provost v. Calder*, 2 Wend. 523; *Jackson v. Gardner*, 8 John. 394; *Ives v. Van Auken*, 34 Barb. 566; *Borst v. Empie*, 5 N. Y. 39, 40; *Duryea v. The Mayor, etc.*, 62 id. 592; 4 Kent's Com. 468; *Craig v. Wells*, 11 N. Y. 315.)

The primary rule of construction applicable to a clause in a deed in the form of an exception or reservation is to gather the intention of the parties from the words, by reading not simply a single clause, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered. (*Clark v. Devoe*, 124 N. Y. 120.) The deed must be held to convey all the interest in the lands which the grantor had unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant. (1 R. S. 748, § 1.) The grantor in framing the clause under consideration used the words "excepting and reserving" evidently without regard to their technical legal significance. Whatever his intention was these words could not well be used together, since they express wholly different if not antagonistic ideas. Their meaning was thus tersely stated in this court by Judge SELDEN:

"A reservation is always of something taken back out of that which is already granted, while an exception is of some part of the estate not granted at all. * * * A reservation is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber. An exception, on the other hand, must be of a part of the thing granted or described as granted, and can be of nothing else." (*Craig v. Wells*, 11 N. Y. 315.)

The exception or reservation was not in favor of the grantor himself, but in favor of the heirs of his father. The language is "unto the heirs of the said John Hopper of the Out Ward, deceased, and to their and each of their heirs," etc. The general rule is that a reservation or exception for the benefit

of a stranger or person not a party to the deed is void. (*Bridger v. Pierson*, 45 N. Y. 603; *Walrath v. Redfield*, 18 id. 457; *Hornbeck v. Westbrook*, 9 John. 73.) The grantor, however, was one of the children and heirs of John Hopper, and it was competent for him to reserve an easement for burial purposes for himself and the other heirs. The purpose of the right retained, whatever it was, is expressed in the last words of the clause, "to bury the dead, etc., forever." The real practical question is whether Matthew, by the use of these words, intended to retain in himself any beneficial interest in the land, or was it the intention of the grantor to convey all the estate that he had. The grant was for a valuable consideration, expressed in the deed to be £550 sterling, and the inquiry may be extended to John Hopper the younger, the grantee, whether he intended in making the purchase to acquire anything less than the whole estate which his grantor had. The agreement between the heirs which antedated the partition and the deed in question, contains a provision which reflects much light upon these questions. After describing each of the shares to be represented by a number on the map or chart, it proceeds as follows: "Whereas, on the lot number two there is erected a burial ground, and now inclosed with a good fence that the same forever hereafter remain, continue and be for the family burying ground, and that whoever shall draw said lot of ground, and should hereafter sell that, the said burying ground shall be reserved in the deed to the purchaser for the above-mentioned laudable purpose of burying, with full liberty to pass and repass as occasion shall require."

The purpose of this provision is plain. The heirs intended that parcel No. 2 should pass in fee to whoever drew it in the allotment, impressed with an easement for burial purposes. Matthew took it subject only to this easement which he was bound by the agreement to preserve in case he sold the share allotted to him. Matthew and John, grantor and grantee in the deed under consideration, were parties to this agreement. They understood its scope and purpose, and it is reasonable and just to presume that neither intended anything

more by the clause in the deed than to carry out what had been provided for in the prior agreement. There is no reason to believe that the parties to the deed intended that the grantor should retain any beneficial interest in the soil of the burying ground plot. Matthew was bound to reserve the right of burial for the heirs when he sold the parcel. He was not bound to retain anything more, and the reasonable construction to be placed upon the words of the grant is that they were employed to limit the estate in the same way as it was held by the grantor. He intended to convey all he had and the grantee intended to acquire no less. This intention was not expressed in clear or accurate language, but as it is apparent from the nature of the transaction and from the circumstances, words and phrases used without a clear perception of their true meaning, must yield to what appears to be the intention. If we look at the conduct of the parties after the execution of the deed this view is confirmed. More than a century has passed since the conveyance and it does not appear that Matthew or any of his descendants made claim to any beneficial interest in the property, while John Hopper, the grantee, and his descendants evidently supposed that they owned the fee, subject only to an easement for the burial of the dead. In a case like this, where the defendant in possession has made valuable and expensive improvements upon the property on the faith of a title more than a hundred years old, the plaintiff is bound to make out a clear case. He cannot rest upon the words of the deed alone. A court must be fairly convinced from the language, read in the light of all the surrounding circumstances, that Matthew Hopper intended to retain in himself the fee of the burying ground, and that the beneficial interest so retained has vested in the plaintiff. A careful consideration of the whole case has not enabled us to reach that conclusion, but, on the contrary, after considering all that has been so forcibly urged by the learned counsel for the plaintiff in support of his view, and without invoking any arguments against the plaintiff's claim except such as seem to be founded in reason, justice and law, we think he has failed

to show any legal title to the property. It is unnecessary to examine the other questions arising upon the record and discussed by counsel, since a decision of them either way would not affect the result.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES McCALDIN, Respondent, v. WILLIAM A. PARKE et al.,
Appellants.

Wharfingers do not guarantee the safety of vessels coming to their wharves. They are bound simply to use ordinary care to make the places in front of their wharves reasonably safe for vessels to approach and lie there.

Defendants owned a wharf in the East river. Plaintiff's vessel, which had been chartered by defendants, while approaching the wharf to deliver a cargo consigned to them, struck a rock in the bottom of the river about seventy feet from the wharf and was injured. In an action to recover damages it appeared that all the approaches to the wharf were safe, but the one over the rock, and hundreds of vessels had gone to the wharf in safety, in all stages of the tide. A surveyor who had examined and located the rock testified, in substance, that in his judgment it was not part of the bottom of the river, but had fallen in there. It also appeared that previous to the accident it had not been heard of and no similar accident had previously happened. Defendants had caused the basin in front of their wharf to be dredged out, and it did not appear that the rock was in the ordinary approach to the wharf, or that defendants had any control of the part of the river where it was, or had any right to remove it. *Held*, that the testimony failed to make out a cause of action.

Plaintiff claimed that defendants had contracted to give him for the approach of his vessel to the wharf sixteen feet of water. Nothing to that effect was contained in the charter party, and the only evidence was plaintiff's testimony to the effect that when negotiating for the charter party one of the defendants said that they were making arrangements to have their dock dredged out, and would give him sixteen feet of water at all stages of the tide. *Held*, that the evidence failed to show a contract as to the depth of the water; but that what was said was a mere representation, and if made in good faith defendants could be charged only for negligence.

Also *held*, that conceding the evidence established a contract, no breach thereof was shown.

Reported below, 69 Hun, 614.

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 8, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries to a steamship owned by plaintiff, sustained in a collision with a rock under water while approaching defendants' wharf.

The facts, so far as material, are stated in the opinion.

Edward M. Shepard for appellant. The accident did not occur in an approach to the berth. It should have been so ruled by the trial judge. It was error to leave it for the jury to determine. (*The Calliope*, L. R. [14 P. D.] 140.) The accident resulted from the fact that the steamer was brought in at the wrong stage of the tide. Even with that tide she could have been brought in safely if not negligently navigated — if she had been loaded less heavily or had approached in a different direction. (L. R. [1 App. Cas.] 11.) Plaintiff failed to show any negligence on the part of the defendant. (*Hubbell v. City of Yonkers*, 104 N. Y. 434; *Laffin v. B. R. R. Co.*, 106 id. 136; *Dougan v. Champlain Co.*, 56 id. 1, 6-8; *Loftus v. U. F. Co.*, 84 id. 455.) It was error to charge "that if the jury believed that the defendants contracted, as Mr. Holmes said, for sixteen, or even fifteen feet of water, the master in navigating had a right to rely upon the fact that at half tide there would be eighteen feet of water." (*Vrooman v. Rogers*, 132 N. Y. 167.) The plaintiff was not free from contributory negligence. (*Vrooman v. Rogers*, 132 N. Y. 171.)

William W. Goodrich for respondent. The place where the steamer struck constitutes a portion of the "approaches" to the defendants' wharf, and this was a question for the jury. (*McCaldin v. Parke*, 66 Hun, 323; 69 id. 614.) The owner or lessee of a wharf is bound to keep the approaches thereto in a safe and proper condition. (*Leary v. Woodruff*, 4 Hun, 99; *Sweeney v. O. C. R. R. Co.*, 10 Allen, 374; *Carleton v.*

F. I. & S. Co., 99 Mass. 217; *O'Rourke v. Peck*, 24 Blatchf. 474; *Nelson v. P. C. Works*, 7 Ben. 39; *P. R. Co. v. Altha*, 22 Fed. Rep. 920, 924; *Sawyer v. Oakman*, 7 Blatchf. C. C. 293; *Leonard v. Decker*, 22 Fed. Rep. 741.) The defendants were guilty of negligence in failing to know the condition of the approaches to their dock. (Shear. on Neg. 658; *Docks v. Gibbs*, 11 H. L. Cas. 512.)

EARL, J. The defendants owned a wharf at Hunter's Point in the East river, near New York, in April, 1887, and the plaintiff's vessel struck a rock in the bottom of the river, about seventy feet from the wharf, while approaching the wharf with a cargo of lumber consigned to the defendants, and she sustained damage for which this action was brought. Upon the first trial of the action there was judgment of nonsuit, which upon appeal was reversed. (66 Hun, 323.) Upon the second trial the plaintiff recovered judgment, which has been affirmed, and which is now brought under review.

The defendants chartered the plaintiff's vessel in November, 1886, to carry lumber from Charleston to their wharf. The vessel was to be under the control and management of the plaintiff's captain and crew, and his compensation was to be the price named for every thousand feet of lumber transported.

The plaintiff claimed to recover both on the ground that the defendants were negligent in allowing the rock to be in the approach to their wharf, and also that they had contracted to give him for the approach of his vessel to their wharf sixteen feet of water at all times of the tide; and the trial judge submitted the case to the jury upon both grounds, charging them that if they found either in favor of the plaintiff he was entitled to recover. Hence, unless the evidence was sufficient to sustain a recovery upon both grounds, the judgment must be reversed, as we cannot say upon which ground the verdict was based.

1. We do not think there was sufficient evidence to show that there was a contract on the part of the defendant to furnish the sixteen feet of water as claimed by the plaintiff.

He, as a witness for himself, testified: "When we were negotiating the charter, Parke asked me what the length of the vessel was; what she drew loaded. I told him that the vessel was 190 feet, and that she would draw between fifteen and sixteen feet. He said he wanted to know because he was about to make arrangements to have his dock dredged out. He said he would give me sixteen feet to go to the dock at all times of the tide." He admitted that he did not testify to this upon the first trial. Holmes, the broker who negotiated the charter party, testified that "they said we were going to have sixteen feet of water. The vessel could come in at any time and all stages of water. That was said by the firm in general conversation; I could not say what individual; it was principally Mr. Parke, part of the negotiation being with him and part with Mr. McClave." This evidence of the plaintiff and Holmes was contradicted by Parke and McClave. We think this evidence utterly fails to show a contract as to the depth of water. The contract which the parties were then negotiating was embraced in the charter party, and nothing is there found about the depth of water in front of the wharf. All the language used and the circumstances of the case forbid the inference that the defendants meant to bind themselves and guarantee that there should be sixteen feet of water at all stages of the tide. They were not asked by the plaintiff to give such a guaranty, and what they said were mere statements and representations, plainly not understood to constitute an agreement outside of the charter party. The parties were not engaged in making two contracts, but one which was contained in the charter party. The statements had reference to the dredging which the defendants expected to make. In *Vroman v. Rogers* (132 N. Y. 167) the action was to recover damages for alleged injury to the plaintiff's barge and its cargo while at the wharf of the defendant in the city of New York, and it was founded on the charge that the plaintiff leased wharfage there of the defendant upon the representation of the latter that the place so let was safe and that it had six feet of water at low tide. There was some evidence tending

to show that substantially such representations were made, and there, as here, it was claimed that the language used constituted a contract. The learned judge writing the opinion in this court said: "There was in terms no undertaking to indemnify or protect the plaintiff against loss by reason of any condition at the wharf or in the bed beneath the water there. The defendant was not asked to do that. What was said by him on the subject was in its nature of representation, and if made in good faith, he could be charged with liability as for negligence only." The language used there by the wharfinger was just as significant of a contract obligation as that we have here. The plaintiff could rely upon the statements testified to by him to exonerate himself from the charge of negligence, but not to impose a contract obligation upon the defendants. But, if we assume that the alleged statements contained a contract, what was the contract? The defendants' wharf was three hundred feet long, and it was possible to approach it in front from all directions. Is it a fair construction of the language used, assuming that it made a contract, that the plaintiff should have sixteen feet of water for any approach he might make to the wharf? There were plenty of safe approaches to the wharf. In fact all the approaches were safe but the one over the rock, and hundreds of vessels had gone to the wharf in all stages of the tide during several years in safety. Indeed, the plaintiff cannot have the benefit of the statement as a contract unless we hold that he was entitled for his vessel to sixteen feet of water in all directions in front of the wharf out into the river so far as any jury might find that the approaches to the wharf extended, and we cannot so hold.

2. But whatever may be said of the contract ground of liability, we are very sure that the defendants cannot, upon the evidence contained in this record, be held liable upon the ground of negligence. As wharfingers they did not guarantee the safety of vessels coming to their wharf. They were bound only to use ordinary care to make the place in front of their wharf reasonably safe for vessels to approach and lie there.

(*Vroman v. Rogers, supra*; *Smith v. Havemeyer*, 36 Fed. Rep. 927; *Carleton v. Franconia I. & S. Co.*, 99 Mass. 217; *Docks v. Gibbs*, 11 H. L. Cases, 712; *The Moorcock*, 14 Prob. Div. Law Rep. 64; *The Calliope*, Id. 138; *S. C.*, House of Lords, App. Cases, L. R., vol. 1, 1891, p. 11.)

A surveyor called as a witness by the plaintiff, who had examined and located the rock upon which the vessel struck, testified as follows: "The rocks which I have mentioned here are not I should judge part of the bottom of the East river; I should judge not from feeling of them; I should judge that they were something that fell in there; they don't seem very large; they were rather loose. When I speak of stone and also of rocks I do not mean the same thing: I indicate that some are smaller and some larger; the rocks are large. That is all I mean by that. I could not say how they came there. I could not tell you the size of them. They seemed to be a surface of three feet or more. I could measure over them and feel it go down; they do not move. I did not feel them tilt or move under the weight of my rod." From this description there is no certainty that the rocks had been there for any considerable length of time. They may have come there so recently that the defendants could not have discovered them by any degree of diligence. They covered but a very small space under a large expanse of water. Previous to the collision of the plaintiff's vessel with them they had never been heard of. They were, as we must assume, upon none of the charts of the river. The defendants had owned and used their wharf for twelve years, and during all that time neither they nor the men in their employ had heard of them. During those years from five hundred to one thousand vessels, many of them as large as plaintiff's vessel, and some larger, had gone in safety to that wharf, as we must assume, in all kinds of weather and at all stages of the tide. And the plaintiff's vessel had gone to the wharf twice before. The defendants had had the place in front of their wharf dredged out immediately after their contract with the plaintiff. Under such circumstances what reason had they to suppose that the approaches

to their wharf were not safe? What greater assurance of their safety could they have than that they had always been found adequate for all the vessels that came there during a series of years? They had employed a dredging company to dredge out the basin in front of their wharf. What more should they have done having no notice whatever of the presence of the rocks there? The case of the *Calliope* is quite in point, and so are the following authorities: *Hubbell v. City of Yonkers* (104 N. Y. 434); *Lafflin v. Buffalo R. R. Co.* (106 id. 136).

There is a singular lack of proof that these rocks were in the approach to defendants' wharf. They were not in any channel which had to be used to approach the wharf. They were in the East river, and for aught that appears may have been in that part of the river used for general navigation. It does not clearly appear that the defendants had any control of the place where they were, or that they had any right to remove them. If they were in the pathway of general navigation, and not in a place necessary for approach to the defendants' wharf, then the plaintiff took the risk of navigation there as other vessel owners did, and for that, too, the case of the *Calliope* is an authority.

Our conclusion is that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except BARTLETT, J., dissenting.

Judgment reversed.

THE ROCHESTER DISTILLING COMPANY, Respondent, v. Asa RASEY, Appellant.

A chattel mortgage cannot, as matter of law, be given future effect as a lien upon personal property which at the time of the delivery of the mortgage was not in existence, actually or potentially, when the rights of creditors of the mortgagor have intervened; the mortgage can only operate on property in actual existence at the time of its execution. While such a mortgage may, as between the parties, be regarded in equity as an executory agreement to give a lien when the property

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comes into existence, some further act thereafter is requisite to make it an actual and effectual lien as against creditors.

Crops which are the annual product of labor and of the cultivation of the earth have no actual or potential existence before a planting.

The lessee of certain farm lands executed a chattel mortgage by its terms covering, among other things, all the potatoes and beans "which are now * * * planted or which are hereafter * * * planted during the next year." The greater part of the planting of potatoes and all that of the beans was done after the delivery of the mortgage. After the planting the growing crops were levied upon and sold under an execution against the lessee, and plaintiff became the purchaser.

{ The mortgagor subsequently foreclosed his mortgage and sold said crops to defendant, who took possession. In an action to recover possession, *held*, that the levy by the sheriff operated to transfer to him possession of the crops: that in the absence of proof of any act by the parties to the mortgage to create an actual lien, as against such possession, the equities of the mortgagee were ineffectual for any purpose; and that plaintiff was entitled to the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage.

Reported below, 65 Hun, 512.

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 4, 1892, which reversed a judgment in favor of defendant entered upon a verdict directed by the court and granted a new trial.

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April, 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the re payment of money borrowed from him, executed and delivered to him a chattel mortgage; which covered "the grass now growing upon the premises leased etc.; also all the corn, potatoes, oats and beans, which are now sown or planted, or which are hereafter sown or planted during the next year etc." At the time, but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes, and all that of the beans, was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops and advertised their sale in August; at which sale plaintiff purchased them. After the

levy by the sheriff, Page, the chattel mortgagee, on July 15th foreclosed under his mortgage, gave notice and sold the growing crops to the defendant. Defendant took possession of the property so purchased and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans and for the defendant as to the potatoes and ordered the exception taken to that direction to be heard, in the first instance, at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge and ordered a new trial; but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

De Merville Page for appellant. Crops to be raised are exceptions to the general rule, that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown, it vests potentially from the time of the executory bargain and actually as soon as the subject arises. (*Andrews v. Newcomb*, 32 N. Y. 417-421; *Green v. Armstrong*, 1 Den. 550; *Smith v. Tabor*, 46 Hun, 316; *Betsinger v. Schuyler*, 46 id. 349; *Conderman v. Smith*, 41 Barb. 404; *Van Hoozer v. Cory*, 34 id. 12; *Mestell v. Hewitt*, 19 Abb. [N. C.] 282-286; *Smith on Chat. Mort.* 8; *Thomas on Chat. Mort.* § 138; *Shuart v. Taylor*, 7 How. Pr. 251; *Jones on Chat. Mort.* §§ 140, 141; *Galen v. Brown*, 22 N. Y. 37; *Van Vechten v. McKone*, 52 N. Y. S. R. 622.) If there had been no potential existence of the mortgaged property at the time of the execution of the mortgage, even then the mortgage created a lien in equity, and the power given the mortgagee to take the property and satisfy his debt out of the proceeds of the sale was irrevocable, and the sale by the mortgagee in this case gave a good title to the defendant. (*McCaffrey v. Woodin*, 65 N. Y. 459; *Wisner v. Ocumpaugh*, 71 id. 116; *Jones v. Mayor*, 90 id. 387; *Benjamin on Sales*, §§ 94, 95; *Coats v. Donnell*, 94 N. Y. 168; *Kribbs v. Alford*, 120 id. 519; *Seymour v. C. R. R.*

Co., 25 Barb. —; *Fisk v. Potter*, 2 Abb. Ct. App. Dec. 145.) In holding that no equitable lien was created in favor of Page, it is claimed that the General Term overlooked the case of *Kribbs v. Alford* (120 N. Y. 519-524). The proof was undisputed that over one-half of the potatoes was put in at the time the mortgage was executed, and plaintiff was not entitled to a direction in his favor for that reason, and its exception, therefore, was not well taken, even if the mortgage would not hold the potatoes subsequently put in. (*The Idaho*, 93 U. S. 575; *Moore v. E. R. Co.*, 7 Lans. 39; *Nowlen v. Colt*, 6 Hill, 461; *Ormes v. Dauchy*, 82 N. Y. 443.)

George D. Reed for respondent. Defendant to succeed in this action must show the mortgage under which he purchased was a legal, valid lien at a time prior to the sheriff's levy, under which plaintiff purchased. (*F. L. & T. Co. v. L. B. Co.*, 27 Hun, 89.) The sheriff having levied upon the property in possession of the judgment debtor, P. P. Lovell, July 5, 1890, took the legal possession at that date, and thereby the property came into the possession of the sheriff, and was to be deemed in the custody of the law until said levy was discharged, vacated or released. (Crocker on Sheriffs, § 436.) Plaintiff became judgment creditor February 13, 1890, and by virtue of an execution, levied upon the property in question July 5, 1890, it then being the property of Philip P. Lovell as alleged in plaintiff's complaint. The defendant does not deny Lovell's title by either a general or specific denial, and it must, therefore, be admitted as true, and judgment cannot be based upon facts to the contrary. (Code Civ. Pro. §§ 500, 522; *Tell v. Bryer*, 38 N. Y. 161; *Payne v. Willett*, Id. 28; *Dunham v. Cudliff*, 94 id. 1, 134; *Fleishman v. Stevens*, 90 id. 110; *White v. Smith*, 46 id. 420; *Day v. New Lot*, 107 id. 148; *Southwick v. F. Nat. Bank*, 61 Hun, 170; *Trisdale v. D. & H. C. Co.*, 116 N. Y. 419.) The chattel mortgage under which defendant purchased was void as against attaching creditors of the mortgagor. (*Wood v. Lester*, 29 Barb. 151; *Gardner v. McEwen*, 19 N. Y. 123; *Otis v. Sill*,

8 Barb. 102; *Bank of Lansingburg v. Crary*, 1 id. 55; *Blanchard v. Cook*, 144 Mass. 222; *R. D. Co. v. Rasey*, 65 Hun, 514; *Jones v. Richards*, 51 Mass. 481; *Page v. Larrow*, 51 N. Y. S. R. 35; *Cressey v. Sabre*, 17 Hun, 120; *Milliman v. Neher*, 20 Barb. 37; Thomas on Chat. Mort. § 141; *Samson v. Moffat*, 61 Wis. 153; *F. L. T. Co. v. L. B. Co.*, 27 Hun, 90; *Barnard v. Eaton*, 56 Mass. 303; *Bennett v. Baily*, 150 id. 260; *Griffith v. Douglas*, 73 Maine, 532; *Beall v. White*, 94 U. S. 382, 387; *Moody v. Wright*, 13 Metc. 17, 30; *Williams v. Briggs*, 22 Am. Rep. 653; *Coats v. Donnell*, 94 N. Y. 177.) Under certain circumstances equity will uphold the transfer of property not in existence or owned by the party at the time of execution of the transfer, and when the property does come into existence, or is purchased by transferrer, the equitable lien attaches at once; but this principle is confined to actions between the original parties. (*Van Hooze v. Cory*, 34 Barb. 9, 13; *Conderman v. Smith*, 41 id. 404; *Andrew v. Newcomb*, 32 N. Y. 417; *McCaffrey v. Woodin*, 65 id. 459; *Coats v. Donnell*, 94 id. 177; *Reynolds v. Ellis*, 103 id. 122; *Wisner v. Ocumpaugh*, 71 id. 113; *Smith v. Tabor*, 14 N. Y. S. R. 644; Thomas on Chat. Mort. §§ 149, 151; *Bank of Lansingburg v. Crary*, 1 Barb. 542, 551; *Milliman v. Neher*, 20 id. 37; *Hutchins v. Ford*, 9 Bush. [Ky.] 318; *Butt v. Ellett*, 19 Wall. 544; *Cole v. Kerr*, 19 Neb. 553; *Holroyd v. Marshall*, 10 H. L. Cas. 191; Thomas on Chat. Mort. § 141; *Moody v. Wright*, 13 Metc. [Mass.] 17, 30; *Barnard v. Eaton*, 2 Cush. 294; *Jones v. Mayer*, 90 N. Y. 387; *Kribbs v. Alford*, 120 id. 519; *Seymour v. C. R. R. Co.*, 25 Barb. 284.) In the case at bar the chattel mortgage was given to secure money loaned and for the indorsement of notes. It had nothing to do with the lease of the real estate, and must stand or fall upon the legal rules applicable to chattel mortgages. (*Cressey v. Sabre*, 17 Hun, 123; *Milliman v. Neher*, 20 Barb. 37; *William v. Briggs*, 16 Alb. L. J. 387; *Page v. Larrow*, 51 N. Y. S. R. 35; *Otis v. Sill*, 8 Barb. 102; *Nestell v. Hewitt*, 19 Abb. [N.

C.] 287.) The sheriff, having levied and taken possession first, obtained legal title. The mortgagee's title is so purely equitable between the parties that it will not prevail against third parties or execution creditors until he takes actual possession. (Thomas on Chat. Mort. § 141; 1 Pars. on Cont. 523; *Thompson v. Van Vechten*, 27 N. Y. 568; *Wiles v. Clapp*, 41 Barb. 645.) It is evident from the way the mortgage was drawn that Page, the mortgagee, knew that the potatoes and beans were not planted at the time of giving the mortgage. If it should be claimed by the defendant that he bought at least the potatoes that were planted at the time of making the sale, he can take only such title as his vendor Page had. (Thomas on Chat. Mort. §§ 125, 126.)

GRAY, J. I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion, in several cases of a kindred nature, in the reports of this court and of other courts in this state, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated. *Grant-ham v. Hawley* (Hobart, 133) is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a

present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases, which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops, as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect, as a reservation, at the time, of the title to the product of the land. That was the case of *Andrew v. Newcomb* (32 N. Y. 417), where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord, until the tenant should give him security for the rent. Judge DENIO repudiated the idea that the arrangement could be called a conditional sale of the flax; because the subject was not in existence. He held that the idea of a pledge or of a sale had no application and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on *Chattel Mortgages*, upon the subject of mortgaging a crop not yet planted, says (§ 149) "the weight of authority inclines to the view that the lien is an equitable one and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agreement;" and, again, he says "the authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching, or judg-

ment creditors of the mortgagor." (About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in presenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor; which equity would enforce as against the latter.)

In *Bank of Lansingburgh v. Crary* (1 Barb. 542) PAIGE J. observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain, one, two, or three years previous to its production."

In a subsequent case, the same learned judge considered the nature of a mortgage relating to property not then in existence and its effect as to creditors of the mortgagor. In *Otis v. Still* (8 Barb. 102) the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel and all scythes, iron, steel and coai which may be purchased in lieu of the property aforesaid." Subsequently, the property was taken under executions issued on judgments and the action was brought for its taking and detention. PAIGE, J. refers to his opinion in *Bank of Lansingburgh v. Crary*, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the ques-

tion of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor. and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property and that no specific lien was created thereby. He says "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In *Gardner v. McEwen* (19 N. Y. 123), the chattel mortgage to the plaintiff, upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant; who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey v. Woodin* (65 N. Y. 459) was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the right of the landlord to do so; holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles; observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen* (*supra*), it was remarked that that "is a case between the mortgagee and creditors and was affected by our act concerning filing chattel mort-

gages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights, as a defense to the plaintiff's (the lessee's) action of trover. In the same case, GRAY C. observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property, which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey v. Sabre* (17 Hun, 120), where the opinion was delivered by BOARDMAN, J., and was concurred in by Justices LEARNED and BOCKES, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey v. Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats v. Donnell* (94 N. Y. 168) ANDREWS, J. observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs v. Alford* (120 N. Y. 519) recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired; but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediately delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution

creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien, when the property came into existence, some further act was necessary, in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument, to create such an actual lien and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.

All concur, except EARL, J., not voting.

Ordered accordingly.

JOHN D. FERGUSON, Respondent, v. THOMAS C. ARNOW,
et al., Appellants.

To authorize a recovery in an action for malicious prosecution in bringing a civil action, wherein defendant was unsuccessful, clear and satisfactory proof of all the fundamental facts constituting plaintiff's case must be given. Costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution, and actions for malicious prosecution based thereon are not to be encouraged.

There was a highway in front of defendant's land which had existed since 1804. In 1888 and 1889 it was four rods wide. The highway commissioner of the town, claiming that, as originally laid out, said road was

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five rods wide, and that it had been encroached upon by the veranda to defendants' house and by their fences, gave them notice to remove the same, and upon their refusal caused them to be removed. Defendants thereupon commenced an action of trespass against plaintiff and others who assisted in the removal, and obtained an order for plaintiff's arrest therein, under which he was arrested and gave bail. Said action resulted in a verdict and judgment for the defendants therein. In an action for malicious prosecution these facts appeared. Defendants had inherited their land from their father: the veranda and fences as they were when removed were there then and had been there for over forty years: defendants had known the highway for many years, had not themselves encroached, and did not know of any encroachment thereon. No claim of any encroachment was made until about 1888. The highway as then fenced out was of the usual width. There was no record of its laying out, and no recorded survey thereof. There was a record of an alteration thereof in 1804, which recited that it was five rods wide, but this defendants had never seen, and in commencing the action of trespass they acted under advice of counsel. *Held*, that plaintiff failed to show want of probable cause, and so a refusal to non-suit was error; that while if want of probable cause had been shown, the fact that an order of arrest was issued would have had a bearing upon the question of malice, it had no bearing upon that of probable cause.

(Argued May 3, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of December, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action for malicious prosecution brought by plaintiff, who had been one of several defendants in an action for trespass, in which the defendants herein were plaintiffs and in which they were defeated.

The facts, so far as material, are stated in the opinion.

J. W. Bartram for appellants. An action for malicious prosecution cannot be maintained except it be proved that the motive in instituting or prosecuting the suit complained of was malicious; that the prosecution was instituted without any probable cause; and that the suit or proceeding for the prosecution of which damages are claimed has been terminated.

(*Stewart v. Sonneborn*, 98 U. S. 187; *Wheeler v. Nesbitt*, 24 How. [U. S.] 544; *Salisbury v. Creswell*, 14 Hun. 460; 6 Wend. 418; *Porter v. Kingsbury*, 77 id. 164; *Palmer v. Avery*, 41 id. 619; *Bennell v. Brown*, 20 id. 99; *Musgrave v. Sherwood*, 76 id. 194; *Thaule v. Krekeler*, 81 id. 428; *Anderson v. How*, 116 id. 336; *Miller v. Milligan*, 48 Barb. 36; *Besson v. Southard*, 10 N. Y. 236; *Heyne v. Blatr*, 62 id. 525; *Israel v. Brooks*, 23 Ill. 526; *Pangburn v. Bull*, 1 Wend. 345; *Sutten v. Andersen*, 103 Penn. St. 151; *McFarland v. Washburn*, 14 Ill. App. 369; *Marks v. Townsend*, 97 N. Y. 590; *O'Brien v. Barry*, 106 Mass. 300; 12 Am. Rep. 682; 9 Abb. Pr. 242; *Brown v. Randall*, 36 Conn. 56.) A new trial should be granted in this case because of the error in permitting plaintiff to prove the moneys expended by him for attorney fees and witness fees. The fees of counsel in the case complained of were not recoverable as damages. (*Stewart v. Sonneborn*, 98 U. S. 187; *Hicks v. Foster*, 13 Barb. 424; *Slopp v. Smith*, 71 Penn. St. 285.) It is affirmatively proved and not denied that plaintiff commenced the action complained of, and procured the order of arrest therein, by advice of counsel, and fully relied on his advice. If the jury believed this proof (as they were bound to do), it constituted in law a probable cause, and being such malice alone, if there was malice, was insufficient to entitle plaintiff to recover. (*Walter v. Semple*, 25 Penn. St. 275; *Cooper v. Utterbach*, 37 Md. 282; *Olmstead v. Partridge*, 16 Gray, 381; *Stewart v. Sonneborn*, 98 U. S. 187.) The court erred in submitting the question of probable cause to the jury. (*Bingham v. Beckwith*, 19 Wkly. Dig. 422; *Andersen v. How*, 116 N. Y. 336; *Carpenter v. Sheldon*, 5 Sandf. 77.)

William C. Reddy for respondent. The prosecution had terminated favorably to respondent. (*Dusenbury v. Keiley*, 85 N. Y. 386; *Robbins v. Robbins*, 133 id. 397; 6 Hun, 344; 2 Johns. 203; 19 Wend. 419-421; 51 Hun, 238; 12 id. 358; 6 Barb. 426; 36 N. Y. 11, 12, 13; *Marks v. Townsend*, 97 id. 590; *Rossiter v. P. Co.*, 37 Minn. 296.) The issue as to

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want of probable cause was properly submitted to the jury and its verdict is conclusive. (Penal Code, § 718, subd. 4; *Com. v. Snelling*, 15 Pick. 337; *Com. v. Williams*, 110 Mass. 401; *Gorton v. De Anglis*, 6 Wend. 444; *Heine v. Blair*, 62 N. Y. 24; *Hazzard v. Flury*, 120 id. 223.) The question of malice was properly left to the jury and its verdict is conclusive. (*Berhans v. Sandford*, 19 Wend. 417; *Jennys v. Davidson*, 13 Hun, 393.)

EARL, J. A party who brings an action for malicious prosecution against a plaintiff who has been unsuccessful in a civil action, should not be permitted to recover without very clear and satisfactory proof of all the fundamental facts constituting his case. Such actions should not be encouraged.

The costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution. Public policy requires that parties may freely enter the courts to settle their grievances, and that they may do this without imminent exposure to a suit for damages in case of an adverse decision by judge or jury.

Among other things the plaintiff was bound to show in this action a want of probable cause for the action the defendants brought against him, and in this we think he utterly failed, and the trial judge upon the undisputed evidence should have non-suited him.

There was a highway in front of the defendants' land which had existed from some time prior to 1804. In 1888 and 1889 it was about four rods wide. The highway commissioner of the town claimed that as originally laid out it was five rods wide, and that it had been encroached upon by the veranda of the defendants' house and by their fences, and he gave them notice of the encroachments requiring their removal. This they refused and then he caused them to be removed, the plaintiff being one of the principal actors engaged under the commissioner in the removal. The defendants then commenced an action of trespass against the plaintiff and others to recover damages for the removal of the

veranda and fences, and in that action they obtained an order for the arrest of the defendants therein, and they were arrested and released upon giving the proper undertaking. The action was put at issue by the answer of the defendants, and it was subsequently brought to trial at a Circuit Court. There evidence was given upon both sides, and the case was submitted to a jury who rendered a verdict for the defendants. Thereafter this plaintiff commenced this action for malicious prosecution of that action, and he recovered a judgment which is brought under review by this appeal.

The three defendants other than Thomas C. Arnow are women, and do not appear to have had anything to do personally with the prosecution of the action against the plaintiff. The defendants had inherited the land from their father, with the veranda and fences there, and they had all known the highway for many years, and had not themselves encroached thereon and did not know of any encroachment thereon by others. The veranda and most if not all of the fences had stood where they were when removed by the plaintiff for at least forty years. The defendants had never heard of any complaint of any encroachment until about 1888. The highway as fenced out was of the usual width, and the claimed width was very unusual. There was no record of the laying out of the highway and no recorded survey thereof. There was a record of the alteration thereof, made in 1804, which simply recited that the highway was five rods wide. But the defendants had never even seen that. They undoubtedly believed that their piazza and fences did not encroach upon the highway, and seemed to have abundant reason for so believing. Under all these circumstances, and others not here alluded to, the defendants commenced the action of trespass, acting under the advice of their counsel. If upon such evidence as we have here an action for malicious prosecution could be maintained, then such an action could be maintained for the unsuccessful prosecution of many of the actions which come upon appeal to this court, and a large proportion of

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unsuccessful actions could be followed by such an action, and litigation be thus interminably prolonged.

The fact that an order of arrest in the trespass action was obtained against the plaintiff has no bearing upon the question of probable cause. If the want of probable cause had been established that fact would have bearing upon the question of malice. For the arrest the plaintiff had his indemnity in the undertaking given upon the granting of the order of arrest.

We regard this as a plain case, and, without a further reference to the law or the facts, our conclusion is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed. _____

NEWTON E. WHITESIDE et al., Appellants, v. NOYAC COTTAGE
ASSOCIATION, Respondent.

Defendant, a club incorporated under the act of 1875 (Chap. 267, Laws of 1875), as amended, and owning a parcel of land for its corporate purposes, sold and conveyed a lot to plaintiff. By the terms of the deed the purchaser became a member of the club and held subject to its rules and regulations. These provided for assessments to be made for purposes specified and for a forfeiture of title in case a member failed to pay an assessment as prescribed. An assessment was made by the board of managers, and upon plaintiff's refusal to pay he was served with a notice that his title and membership would be forfeited, unless at a date specified he appeared before the board and showed cause to the contrary. Plaintiff thereupon brought this action to have the action of the board rescinded, as a cloud on his title, and to restrain the forfeiture. The assessment on its face showed it was made in part for permanent improvements. Plaintiff claimed that no assessments could be made for such purposes. *Held*, that conceding this claim to be correct there was no cloud on title, as the illegality appeared upon the face of the papers, and the facts the association would be compelled to prove to enforce at law the assessment or forfeiture would themselves show the invalidity.

By the terms of the plaintiff's deed he was granted "the use of the club house, public grounds, water front," etc. By the by-laws two funds were constituted, one to be "applied exclusively to the purchase, improvement and maintenance of the grounds and other property of the

association." The other, into which all assessments were to be paid, was to be appropriated "in the first instance" to current expenses, but it was provided that any surplus at the end of the year should be turned over to the other fund. It was also provided that the board of managers might "from time to time make assessments for other purposes * * * as they shall deem necessary." Held, that taking and construing the deed and by-laws together the assessment was valid and enforceable, as prescribed by the by-laws.

Reported below, 68 Hun, 565.

(Argued May 3, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of May, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

This action was brought by plaintiffs, who were the owners of certain lots by purchasing from defendant, a club of which they had become members, to remove a cloud from their title caused by the lien of an assessment levied under the by-laws of defendant, and to restrain defendant from forfeiting their rights as members by reason of non-payment of said assessment.

The facts, so far as material, are stated in the opinion.

Eugene D. Hawkins for appellants. The entire procedure for the assessment is apparently valid, but the parol evidence shows that the purpose of the assessment was unlawful, viz., to defray expenses for which an assessment was not authorized. A court of equity will, under such circumstances, intervene. (Pom. Eq. Juris. § 1399; *Williams v. Ayrault*, 31 Barb. 364; *Wood v. Seely*, 32 N. Y. 105; *Dows v. City of Chicago*, 11 Wall. 110; *Frost v. Spelthey*, 121 U. S. 556; *Hatch v. City of Buffalo*, 38 N. Y. 276; *Sanders v. Yonkers*, 63 id. 489; *Heywood v. City of Buffalo*, 14 id. 541; *Schroeder v. Gurney*, 73 id. 430.) Section 3 of the statute under which the defendant was organized says that membership shall be determined in three ways and only three, to wit, death, voluntary withdrawal or expul-

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sion. This is not one of these three ways. A by-law providing for the expulsion of members for a cause or in a manner different from that authorized by statute is illegal. (Cook on Stocks & Stockholders [2d ed.], § 700.) The plaintiffs were not obliged to wait until December 28, 1891, and then state their case to the board of trustees and await its action, before bringing this equity suit. (*Loubat v. Leroy*, 17 Abb. [N. C.] 513.)

William C. Reddy for respondent. The appellants' title to their lots is a conditional one. (Laws of 1875, chap. 267, § 3; Laws of 1888, chap. 536.) As members of the respondent club, appellants are voluntarily subject to the by-laws, rules and regulations of the club, unless the same be inconsistent with the Constitution and laws of the land. (Laws of 1875, chap. 267, § 2.) Respondent's by-laws are not *ultra vires* or inconsistent with the laws of the state. (Laws of 1875, chap. 267; *Cudder v. Estwick*, 6 Mod. 124; *Ex parte Wilcocks*, 7 Cow. 402; Angell & Ames on Corp. § 117; 1 Burr. 233.) But, irrespective of the validity of the by-laws, etc., appellants are not entitled here to the intervention of equity. (*Thomas v. M. M. P. Union*, 121 N. Y. 46.)

FINCH, J. The plaintiff and others situated like him joined a club incorporated under the Laws of 1875, (Chap. 267), and the amendments thereof. It had become the owner of about forty acres of land for its corporate purposes, and had sold and conveyed to the plaintiff a single lot or parcel for the purpose of the erection by him of a dwelling house thereon. By the purchase he became a member of the club, and subject to its rules and regulations, and this liability appeared upon the face of his deed and limited and modified the title transferred. The lot could only be used for the construction and occupation of a dwelling house, and was inalienable except to the club or those accepted as its members; and the grantee covenanted by his deed to hold the land subject to assessments by the managers of the association to meet any deficiencies arising

from the maintenance of its public grounds, club house and other property, and to submit to a forfeiture of his estate if he should fail to pay as prescribed. The by-laws of the association contained all these provisions, and dictated in detail the mode of procedure. An assessment was made in accordance with their terms, and the plaintiff, neglecting and refusing to pay, was served with a formal notice that his title and membership would be forfeited unless, at a specified date, he appeared before the board of managers and showed cause to the contrary. Instead of so appearing he brought this suit in equity, asking as relief that the action of the board be rescinded, and it be enjoined from forfeiting the plaintiff's title and membership. The complaint was dismissed and the judgment affirmed by the General Term.

That affirmance went upon the ground that no equitable cause of action was established. There was no cloud upon the title if the plaintiff's view of the by-laws was correct. His theory was and is that, by their terms, no assessment could be made for permanent improvements, but only for current expenses. The assessment showed on its face that it was made in part at least for permanent improvements, and so was unauthorized by the by-laws if plaintiff's construction is the true one. The case is not one of an assessment by a public authority, which is presumably valid, but of a claimed contract right, which has no force except under the contract, and which, if invalid at all, was so upon the very face of the claim. The facts which the association would be compelled to prove, in order to enforce at law the assessment or forfeiture, would themselves show the invalidity of their claim if the plaintiff's construction of the by-laws be correct.

But that construction is not correct. It is apparent from the by-laws, the circular disclosing the aims and objects of the association, and the very terms of plaintiff's deed, that the expenditures of which complaint is made were fairly within the scope of those current expenses and that maintenance to which the by-laws and the deed referred. By his deed the plaintiff became a member of the association and as such

gained the right to "the use of the club house, public grounds, water front, beaches, yachts, fishing privileges, etc." He knew, therefore, that they did exist or were to exist, and were to be paid for out of the revenues of the association, any deficiency in which was to be met by an assessment within certain fixed limits. The appellants' construction is purely and severely technical, and disregards utterly the manifest purport and meaning of the contract. By chapter fifth of the by-laws two funds were constituted: one the land and improvement fund to be "applied exclusively to the purchase, improvement and maintenance of the grounds and other property of the association;" and the other, into which all membership fees, annual dues and assessments were to be paid, called the current expense fund. This was to be appropriated "in the first instance," that is, primarily, to such current expenses, including taxes, but any surplus at the end of a year might be "turned into the land and improvement fund," so that assessments creating a surplus beyond current expenses could, at the option of the managers, go to permanent improvements and the purchase of needed "property." By section 2 of chapter six provision was made for assessments to pay taxes; and then follows a broad general provision that "the board of managers may also, from time to time, make assessments for other purposes * * * as they shall deem necessary." There is here no limitation of the power within the scope of the corporate purposes, except as to amount, and they may be carried to permanent improvements when not needed for current expenses. The by-laws and the deed read together and properly construed leave no reasonable doubt of the validity of the assessment.

It may be added that we approve also of the ground taken by the General Term founded upon *Thomas v. M. M. P. Union* (121 N. Y. 50), and beyond their argument in that direction no further discussion is necessary.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THE ELMIRA SAVINGS BANK, Respondent, v. CHARLES DAVIS,
as Receiver, etc., Appellant.

The provisions of the National Banking Law (§ 5242), prohibiting transfers or payments by a National bank after the commission of an act of insolvency, or in contemplation thereof, made "with a view to the preference of one creditor to another," was not intended to and does not require that in the distribution of the assets of an insolvent National bank, rights lawfully acquired by a creditor, or superior equities, should be disregarded and annulled, and so, liens, equities or rights arising by express agreement between the bank and one contracting with it, or implied from the nature of the dealings between the parties, or by operation of law prior to insolvency, and not in contemplation thereof, are not invalidated.

It is the voluntary act of the bank in view of insolvency, and with the view of preventing the ratable application of its property which is declared to be null and void.

Accordingly *held*, that the provisions of the State Banking Law (§§ 118, 130, chap. 689, Laws of 1892), permitting savings banks to keep a fund on deposit in State or National banks, and providing that in case the bank receiving the deposit becomes insolvent, the savings bank shall have a preference, is not in conflict with the National law; and that a savings bank having deposits with a National bank when the latter became insolvent, was entitled to a preference in payment out of the assets of the insolvent bank in the hands of a receiver, after its circulating notes had been provided for and all the conditions of the National law complied with.

Reported below, 73 Hun, 857.

(Argued May 3, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 27, 1893, which directed judgment in favor of plaintiff upon a case submitted under the Code of Civil Procedure (§ 1279).

Plaintiff, a savings bank incorporated under the laws of this state, had, on May 24, 1893, a deposit account with the Elmira National Bank. On that day said bank having become insolvent, defendant was appointed its receiver by the comptroller of the currency. Plaintiff claimed that the amount of its deposit

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should be paid as a preferred claim under the State Banking Law. (Laws of 1892, chap. 689, § 130.)

The provisions of the statutes and further facts, so far as material, are stated in the opinion.

Charles H. Peck for appellant. Congress is empowered to prevent preferences to creditors of insolvent National banks, and, having so legislated, the Federal law is supreme. (*N. Bank v. Colby*, 21 Wall. 613; *Bank of Bethel v. P. Bank*, 14 id. 402; *C. C. N. Bank v. United States*, 107 U. S. 445; *Balch v. Wilson*, 25 Minn. 299; *Schmidt v. N. Bank of Selma*, 22 La. Ann. 314; *Turner v. N. Bank of Keokuk*, 20 Iowa, 568; *V. N. Bank v. Taylor*, 56 Penn. St. 14; *Raynor v. P. N. Bank*, 93 N. Y. 374; *Hayes v. Beardsley*, 136 id. 304; *Bank v. Butler*, 129 U. S. 223; *Robinson v. N. Bank*, 81 N. Y. 393; *M. N. Bank v. P. N. Bank*, 30 Hun, 53; 93 N. Y. 648; *Wilson v. B. C. M. Co.*, 12 Pet. 250; *New York v. Coombs*, Id. 72; *United States v. Milne*, 11 id. 155; *C. N. Bank v. R. N. Bank of Mansfield*, 52 How. Pr. 138; *Bank of Redemption v. Boston*, 125 U. S. 67; *Rosenblatt v. Johnston*, 104 id. 462; *W. N. Bank v. Parker*, 41 Fed. Rep. 402; *Wasson v. N. Bank*, 5 West [Ind.], 270; *N. Bank v. Richmond*, 42 Fed. Rep. 877; *F. N. Bank v. Herbert*, 44 id. 158; *F. N. Bank v. Landes*, 45 id. 619; *People v. Smith*, 50 Hun, 307.) The state law does not and cannot give to a savings bank an equitable lien on its deposit in a National bank. (*Payne v. Wilson*, 74 N. Y. 353; *P. N. Bank v. Mixer*, 124 U. S. 721; *C. C. N. Bank v. U. S.*, 107 id. 445; *N. Bank v. Commonwealth*, 9 Wall. 353; *Waite v. Dowley*, 94 U. S. 527; *W. U. Tel. Co. v. Mass.*, 125 id. 551; *Hughitt v. Hayes*, 136 N. Y. 167; *Richards v. La Turette*, 119 id. 59; *Commercial Bank v. Hughes*, 17 Wend. 94; *Marsh v. O. C. Bank*, 34 Barb. 298; *A. N. Bank v. F. N. Bank*, 46 N. Y. 82; *F. N. Bank v. O. N. Bank*, 60 id. 288; *C. Bank v. People*, 93 id. 582.)

Edward Winslow Paige for appellant. Every claim against the association lately known as the Elmhurst National Bank, which

has been proved to the satisfaction of the comptroller of the currency of the United States, or adjudicated in a court of competent jurisdiction, is entitled to its ratable share of the things which the defendant has got or can get, and which are money or will produce money. (Laws of 1892, chap. 689, § 130.)

Edward G. Herendeen for respondent. National banks are intended to be placed on the same footing as state banks by section 130 of the Banking Law of this state giving to savings banks making authorized deposits in a bank thereafter becoming insolvent, a preference over other depositors in the distribution of the assets of the insolvent bank. (Laws of 1892, chap. 689, §§ 118, 119, 130; 73 Hun, 360.) The National Banking Law is not inconsistent with the provisions of our State Banking Law, giving a preference to savings banks over other depositors in the distribution of the assets of an insolvent National bank. (U. S. R. S. §§ 5236, 5242; *Scott v. Armstrong*, 146 U. S. 499; *Yardley v. Clothier*, 51 Fed. Rep. 506; 49 id. 337; *S. S. Co. v. Armstrong*, 37 id. 18; *Armstrong v. Warner*, 31 N. E. Rep. 877; *Hughitt v. Hayes*, 136 N. Y. 136; *C. E. Bank v. Blye*, 101 N. Y. 303; *F. N. Bank v. Dunbar*, 118 Ill. 625; *Hade v. Mc Vey*, 31 Ohio St. 231, 238; *C. N. Bank v. Armstrong*, 59 Fed. Rep. 372; *Gilbert v. Mortimer*, 10 B. & C. 44; *Clark v. Islin*, 21 Wall. 360; *N. Bank v. Graham*, 100 U. S. 699.) Section 130 of the Banking Law of this state, making deposits by a savings bank a preferred claim against an insolvent National bank, is within the proper sphere of state legislation; is not inconsistent with the proper construction of the National Banking Act; and to construe the two acts as inconsistent and repugnant would force the National legislation beyond constitutional limitations. (*N. Bank v. Commonwealth*, 9 Wall. 359; *W. U. Tel. Co. v. Mass.*, 125 U. S. 551; *Waite v. Dowley*, 94 id. 527; *Thomas v. F. Bank*, 46 Md. 43; *F. & M. N. Bank v. Dearing*, 91 U. S. 29; *Winter v. Baldwin*, 89 Ala. 483.) It is conceded by both parties to this controversy, and it is now the settled practice, that such actions

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as this may be brought in state courts, and that the receiver alone may be a party. (*Adams v. Darmis*, 29 La. Ann. 315; *Case v. Terrell*, 11 Wall. 199; *Kennedy v. Gibson*, 8 id. 498; *Case v. Bank*, 100 U. S. 446.)

GRAY, J. The defendant is the receiver of an insolvent National bank and the plaintiff, a savings bank created under the laws of this state, claims, with respect to its deposits theretofore made with the former, to be entitled to be preferred in payment, under section 130 of the Banking Law of this state. (Laws of 1892, chap. 689.) The circulating notes have been provided for and all other conditions of the Banking Law have been complied with, so as to entitle the claim to be allowed, if not in conflict with the provisions of the National Banking Law. The State Banking Law permits the trustees of savings banks to keep an "available fund * * *, on hand or deposit in any bank in this state, organized under any law in this state or of the United States," etc., etc (§ 118.) Section 130 provides as follows :

"All the property of any bank or trust company which shall become insolvent shall, after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees or receiver thereof in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company."

The sole contention is whether this provision can be given effect in the distribution of the property of insolvent National banks. The appellant insists that it conflicts with certain provisions of the National Banking Law ; which were framed to prohibit preferences, and relies upon the following sections of the Revised Statutes of the United States.

"§ 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall

make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"§ 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any National banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court."

The provisions of the Federal law as to National banks constitute a complete system for their establishment, government and winding up. (*Cook Co. Nat. Bank v. United States*, 107 U. S. 445.) As agencies of the government, in the administration of a branch of the public service, the states are without authority to exercise any control over them, or to affect their operation, (except so far as Congress may permit); where the legislation will conflict with the National law, or will tend to impair or destroy their utility and efficiency in performing the functions, by which they are designed to serve the government. (*National Bank v. Commonwealth*, 9 Wall. 353; *Farmers' National Bank v. Dearing*, 91 U. S.

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33; *Waite v. Dowley*, 94 id. 527; *Western Union Tel. Co. v. Mass.*, 125 id. at p. 551.) If the State Banking Law, in these provisions which we are considering, comes into conflict with the operation of the Federal law, the former must be held ineffectual to impede the due execution of the latter, in all respects therein intended and provided for. Is that the case here? We are not now concerned with questions of the propriety or justice of the state law, in directing the claims of savings banks to be preferred in payment over those of other depositors. That is the law of the state, enacted by its legislature in furtherance of the protection and security designed to be afforded to the savings of the people and if the inhibition of section 5242 of the U. S. Revised Statutes does not extend so far as to prevent its operation in such a case, it must be given its full effect. That effect would be to preserve and enforce a right or preference, which had accrued to the savings bank in making deposits of its funds with the National bank, and which will be deemed to have been in the contemplation of the parties and assented to. Their contractual relations were necessarily influenced and shaped by the provisions of this public law; which gave to that class of depositors a superior claim or lien to that of other depositors or creditors upon the property of the bank. Are these provisions for security against a possible loss of the deposits of savings banks inconsistent with that equal distribution among creditors, which was intended by the National law to be effectuated, when the moment of insolvency arrived? The language of section 5242 does not seem to convey that idea, in providing that "all payments of money to either," (*i. e.* shareholders or creditors) "made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." In *Corn Exchange Bank v. Blye* (101 N. Y. 303), it was said by this court of this section that "it specifically prohibits all trans-

fers of the corporate property made with a view to preferences and so protects the creditors from any voluntary act of the bank, which selects out favored individuals for payment." It is a transfer of property, or a payment of moneys, in contemplation of insolvency, in order to give a preference to the creditor, which the law condemns. Its policy is to secure equality of distribution of the assets among creditors; but it was not intended that, in the distribution, rights lawfully acquired and superior equities should be disregarded and annulled.

But we have upon this question a very recent and emphatic declaration by the United States Supreme Court, in the case of *Scott v. Armstrong* (146 U. S. 499). In that case, the question related to the right of one who was debtor to a National bank to an equitable offset, as against its receiver; appointed by the comptroller of the currency to close up its affairs for insolvency. Sections 5236 and 5242 were relied upon as forbidding it; because of their requirements that there should be a ratable disposition among the creditors and that there should be no preference given or suffered, in contemplation of, or after committing the act of insolvency. Chief Justice FULLER, delivering the opinion of the court, said: "We do not regard this position as tenable. Undoubtedly any disposition by a National bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part

of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that, which at the time of the insolvency belongs of right to the debtor, does not belong to the bank."

This is very explicit language and must be regarded as controlling upon us, as a construction placed by the highest Federal Court upon these provisions of the National Banking Law. In that case and in those of *Waite v. Dowley* and *National Bank v. Commonwealth* we have authoritative expressions of opinion from which to imply the doctrine, that state legislation in regulation of the general conduct of the business of the National bank with its depositors is not an interference with any exercise of the governmental power. If in the course of its business, through force of state laws, rights are accorded to, or liens are acquired by, depositors or creditors, they are not within the purview of sections 5236 or 5242. The distinction between what is legislation by the state which conflicts with the National Banking Law and what is a constitutional exercise of state legislative power in relation to National banks is found by considering whether it assails or affects the independence of the National bank, in the performance of its functions as an agency of the general government. With respect to its contracts, its rights and remedies, they may, in general, be subject to, or based upon, state legislation, without impairing their efficiency as National institutions. (*Western Union Co. v. Massachusetts, supra.*) It is the voluntary act of the National bank, in contemplation of its insolvency and with the view of then preventing the ratable application of its property, which is avoided by the National law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the state law required and regulated; which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened and the receiver was appointed, he took over the property of the insolvent concern, as trustee for its creditors and shareholders, under the same conditions as the

bank held it and subject to the right of this plaintiff to be first paid in full, before other creditors were paid.

I think the judgment of the General Term below was right and that it should be affirmed; with costs.

All concur, except EARL and PECKHAM, JJ., not voting.

Judgment affirmed.

STELLA STAFFORD, Respondent, v. THE MORNING JOURNAL
ASSOCIATION, Appellant.

In an action for libel the complaint averred that plaintiff was of "good character and repute, and enjoyed the respect of her friends and acquaintances and of the community." This was put in issue by the answer. Testimony was offered by plaintiff on the trial to prove her allegations, which was received under objection and exception. *Held*, that in the absence of a disclaimer on the part of defendant when the objection was raised, of any purpose of questioning plaintiff's reputation, the reception of the testimony was not error; that while it was unnecessary for plaintiff to make the averment, having done so, and defendant having made an issue thereon, this opened the door for the evidence.

Houghtaling v. Kilderhouse (1 N. Y. 530); *Pratt v. Andrews* (4 id. 493);

Young v. Johnson (123 id. 226), distinguished.

Reported below, 68 Hun, 467.

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The action was brought to recover damages for the publication in the *Morning Journal* of an article complained of as libelous and which reads as follows:

"Le Huray Sisters, Blanche, Stella and Allien, just from Paris; massage, French style; love secrets; how to get a husband; inclose stamp; valuable information for ladies by aid of cards. Le Huray Sisters, 444 Second Ave., Mount Vernon, N. Y."

The complaint alleged that plaintiff's maiden name was Le Huray, and had two sisters named Blanche and Allien, respectively, who, with herself, resides at the place named. That the article was published in a column in defendants' paper, headed "Astrology," and defendant thereby falsely represented that plaintiff had authorized the publication of the article, and held her out to the public as a person of loose morals, etc.

Further material facts are stated in the opinion.

B. F. Einstein for appellant. The court erred in permitting evidence to be given of the general reputation of the plaintiff for chastity and virtue. (*Pratt v. Andrews*, 4 N. Y. 493; *Houghtaling v. Kilderhouse*, 1 id. 530; *Young v. Johnson*, 123 id. 126; *Pink v. Catanich*, 51 Cal. 420; *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236.)

Roger M. Sherman for respondent. The evidence as to character was properly received. The defendant, joining in the issue, is precluded from objecting to evidence to maintain the affirmative thereof. (*McIntyre v. Ogden*, 17 Hun, 604; *Blossom v. Barrett*, 37 N. Y. 438; *Doty v. Thompson*, 116 id. 519, 520; *Anderson v. Long*, 10 S. & R. 61; *Foot v. Tracy*, 1 Johns. 46; *Paddock v. Salisbury*, 2 Cow. 813; *Williams v. Haig*, 3 Rich. L. [S. Car.] 362; *Romayne v. Duane*, 3 Wash. C. C. 246; *Bennett v. Hyde*, 6 Conn. 26, 27; *Stow v. Converse*, 4 id. 41, 42; *Harding v. Brooke*, 22 Mass. 247; *Shroyer v. Miller*, 3 W. Va. 161; *Rhodes v. Ijames*, 42 Am. Dec. 604; 1 Greenl. on Ev. § 461; *Conley v. Meeker*, 85 N. Y. 618; *People v. Yslas*, 27 Cal. 632, 637; *Kilburn v. Mullen*, 22 Iowa, 502; *Jackson v. Lewis*, 13 Johns. 504, 505; *Bakeman v. Rose*, 14 Wend. 109, 110; 18 id. 148, 149; *Wehrkamp v. Willet*, 4 Abb. Ct. App. Dec. 556; *Watson v. Campbell*, 38 N. Y. 155; *Hawthurst v. Ritch*, 119 id. 622; *Baldwin v. Short*, 125 id. 560.)

GRAY, J. We are quite satisfied with the disposition made by the General Term of the questions presented by the appel-

lant's exceptions at the trial and the only one to which we shall refer is that arising upon exceptions to the admission of evidence as to the general reputation of the plaintiff for chastity and virtue.

The complaint alleged that plaintiff was of "good character and repute and enjoyed the respect of her friends and acquaintances and of the community."

The answer stated that the defendant had "no knowledge or information sufficient to form a belief as to the allegations contained in that paragraph of the complaint."

At the commencement of her case the plaintiff called witnesses to prove her allegations and the defendant objected, upon the grounds of immateriality and of incompetency and, also, that "it is not one of the issues under the pleadings."

The general rule as to the impropriety of permitting a party to give evidence of his good reputation, in actions for the recovery of damages for libel or slander, has reference to cases where reputation is not a material issue, or where it has not been attacked. The reason for it is in the absence of any usefulness in proving that which the law already assumes and because the character of the complainant does not form the basis for the recovery of general damages. But this case differs from those relied upon by the appellant in certain aspects. In the first place, the plaintiff's allegation was put in issue by the answer. It is true that it was unnecessary for the plaintiff to allege as she did, with respect to her reputation; but having done so, the defendant, in choosing to make an issue upon it in its answer, opened the door for the offer of evidence. In the next place, when the question of materiality was raised, it was then open to the defendant to disclaim any purpose of questioning the plaintiff's reputation. But it did not do so. The objection that "it was not one of the issues under the pleadings," of course, was not true; while, if the proof was immaterial, then no harm can be said to result from giving it and in establishing that which the law presumed. The very effect before the jury of failing to disclaim any purpose of questioning the plaintiff's character, when the question

was raised upon the issue and when endeavoring to prevent any proof as to what it was, must have been bad and, as I think, warranted the trial judge, under the circumstances, in permitting evidence to be given. I do not think the plaintiff was absolutely bound, in the face of an issue tendered by the defendant as to her reputation for chastity and virtue, to sit quiet and to rest upon the legal presumption. The evidence bore upon an issue in the case, which the defendant could have avoided, and the plaintiff, in anticipating any possible attack and in insisting upon the admission of the evidence in question, in the absence of any disclaimer on the part of the defendant, should not be made to suffer from the ruling in question. She very properly offered it as a part of her case (*Young v. Johnson*, 123 N. Y. 226) and the trial judge committed no error in permitting proof of what the law assumed.

The cases in this court referred to by the appellant are not in conflict with these views. *Houghtaling v. Kilderhouse* (1 N. Y. 530, affg. 2 Barb. 149), was an action for slander; for charging the plaintiff with poisoning defendant's horses and defendant pleaded not guilty. In reply to defendant's testimony, tending to prove the truth of the charge, the plaintiff offered to prove that his general character was good and the evidence was excluded. It is obvious that such evidence could not constitute any rebuttal of plaintiff's guilt, if shown by the circumstances disclosed by defendant's evidence.

Pratt v. Andrews (4 N. Y. 493) was an action for *crim. con.* with plaintiff's wife. Defendant gave evidence tending to prove plaintiff's knowledge and connivance, in support of a defense to that effect; but did not assail the general character of plaintiff's wife. Evidence was offered by plaintiff, in rebuttal, that the reputation of his wife was good before the defendant attended her as physician and it was excluded. The evidence had no bearing upon any issue in the case.

In *Young v. Johnson* (123 N. Y. 226) the plaintiff, in an action to recover damages for rape and after defendant had given his proof, offered evidence to prove her general reputation and good moral character in the community. The exclu-

sion of the evidence was upheld here, upon the ground that the plaintiff's reputation had not been attacked and that the defendant had expressly disclaimed any such purpose. In that case it was significantly remarked that if the testimony was admissible, as bearing upon the general issues in the case, it could have been given before plaintiff rested her case.

I think the judgment below was right and that it should be affirmed, with costs.

All concur.

Judgment affirmed. •

SARAH V. DENISE, Respondent, v. ALBERT L. SWETT,
Appellant.

The State courts have no jurisdiction of an action for an infringement of a patent, and so, unless there is an agreement on the part of the owner for the manufacture and sale of the patented article, an action is not maintainable in said courts to recover therefor.

In 1882 B., the owner of a patent, and plaintiff's assignor, and the firm of S. & S., entered into an agreement by which he gave to the firm a license to manufacture and sell the patented article for one year on payment of specified royalties. By the terms of the agreement the firm had the privilege of renewing the license on giving sixty days' notice. The agreement was renewed until May 1, 1885, when a new agreement was made renewing it for another year, but any further extension to depend upon the mutual agreement of the parties. Pending negotiations for renewal the firm continued to manufacture the article and paid the agreed royalties up to June 30, 1886. No new agreement was made. B. notified the firm that the license was revoked, and the old agreement was considered by both parties as terminated at that time. The firm, however, thereafter manufactured and sold an article varying in some particulars from the patent, but in substance the same, which it claimed was not an infringement upon the rights secured by the letters patent. In an action to recover royalties for the goods so manufactured, *held*, that the continued manufacture and the failure of B. to take further action to prevent it after said notice, did not amount to a waiver of the notice or a renewal of the license, and so plaintiff was not entitled to recover the agreed royalties; that the only cause of action was for an infringement, of which the state court had no jurisdiction.

U. M. Co. v. Lounsbury (41 N. Y. 353), distinguished.

Denise v. Swett (68 Hun, 188), reversed.

(Argued May 3, 1894; decided June 5, 1894.)

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Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edmund L. Pitts for appellant. If the cause of action does not arise from a contract, or agreement to pay for use, or manufacture of a patented article, but is for the infringement of a patent right, or to recover compensation or damages for the use, or sale and manufacture of a patented article, the United States courts have exclusive jurisdiction. (*Hyatt v. Ingalls*, 124 N. Y. 93, 102; *H. S. M. Co. v. Reinock*, 102 id. 167; *S. P. P. Works v. Starling*, 127 U. S. 376; *Brusie v. Peck*, 135 N. Y. 622; *Allison v. Hart*, 30 N. Y. S. R. 697; *Dudley v. Mayhew*, 3 N. Y. 1; *Hovey v. R. T. P. Co.*, 57 id. 119; *Dewitt v. E. N. M. Co.*, 66 id. 461; *C. S. S. Co. v. Clark*, 100 id. 365; *Kayser v. Arnold*, 2 N. Y. S. R. 635; *Skinner v. Wood*, 140 N. Y. 217.) The evidence shows that Brown's patents are worthless; that the invention was not new or novel, but had been in public use for many years. While the agreement was in force, we concede, the defendant would be precluded from questioning its validity, but without an agreement, or after it had terminated, this doctrine does not apply, and he had the right to deny its legality, and the doctrine of estoppel does not apply. (*Camp v. Camp*, 5 Conn. 291.) The question of jurisdiction was fully pleaded in the answer, although it was not necessary to be taken by demurrer or answer. (Code Civ. Pro. § 499; *De Barnie v. Halliday*, 4 Abb. [N. C.] 111.) The referee erroneously refused to find that the agreement set forth in the complaint was not continued in force or effect after June 30, 1886, and was not in force or effect between the parties after that date. (*Beck v. Sheldon*, 48 N. Y. 365; Code Civ. Pro. § 993; *James v. Cowing*, 82 N. Y. 451; *Bedlow v. N. Y. F. D. Co.*, 112 id. 263.) While we understand that this court will not

reverse upon a question of fact, we do understand it to be error, of which it will take cognizance, when upon all the evidence the facts as found are not supported, and upon the uncontradicted evidence, the facts the referee refused to find are fully established. (*Kennedy v. Porter*, 109 N. Y. 526; *Halpin v. P. Ins. Co.*, 118 id. 167.)

Quincy Van Voorhis for respondent. The plaintiff has a cause of action on the agreement and the action was properly brought. (*Thompson v. Bank B. N. A.*, 82 N. Y. 1; *Hyatt v. Ingalls*, 124 id. 93.) This is strictly an action upon contract for the recovery of money. (*Hyatt v. Ingalls*, 124 N. Y. 93; *Albright v. Teas*, 106 U. S. 613.) It is of no consequence whether the principle of the patented device is new or old, or whether the patent is valid or invalid; the defendant is estopped from raising any question of that sort. (*Hyatt v. Ingalls*, 124 N. Y. 93.) The defendant's contention that the plaintiff has not established her title to the license fees which accrued after April 13, 1887, has nothing to support it. (Code Civ. Pro. § 993; *Turner v. Weston*, 133 N. Y. 650; *Travis v. Travis*, 122 id. 449; *Daniels v. Smith*, 130 id. 696; *Thompson v. Bank of B. N. A.*, 82 id. 1; *Burnap v. Bank of Potsdam*, 96 id. 125.) The referee properly refused to find defendant's request. (Code Civ. Pro. § 1023; *Davis v. Leopold*, 87 N. Y. 620; *Callanan v. Gilman*, 107 id. 360.)

PECKHAM, J. This is an action brought to recover certain royalties alleged to be due plaintiff by virtue of an agreement between plaintiff's assignor and the predecessors of the defendant, under which it is alleged the defendant and his predecessors (whose liabilities in that regard the defendant assumed) manufactured and sold a certain patented article designated in the agreement as "an improved screw barrel press."

The case was tried before a referee, who reported in favor of the plaintiff, and the judgment entered upon such report has been affirmed by the General Term.

The liability of the defendant depends upon the question

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whether, subsequent to June 30, 1886, the agreement to pay royalties was in force. The plaintiff affirms and the defendant denies the proposition. Unless there were an agreement to pay royalties for the manufacture, it is plain that the state courts would have no jurisdiction, for they cannot entertain an action to recover damages for an infringement of a patent. (*The Continental Store Service Co. v. Clark*, 100 N. Y. 365, and cases cited.)

Upon the question of the existence of the alleged agreement the evidence is without contradiction and may be thus stated: In 1882 one Henry H. Brown was the proprietor of the invention above designated, and defendant and one Samson were partners in business as manufacturers in Orleans county, in this state. They entered into an agreement with Brown in July of above year under which Brown licensed the partners to manufacture and sell the patented article for one year from July 1, 1882, upon payment of certain named sums for royalties upon each and every dozen presses manufactured and sold by them. The agreement contained the further provision that the partners might obtain an extension of the agreement for any length of time within the life of the patent or which might be desired by them upon their giving notice in writing of their desire to renew the contract at least sixty days before its expiration. This agreement was in fact extended under the above provision from year to year until May 1, 1886, and it is conceded that the renewal made in the spring of 1885 was for a term which would end in May, 1886.

Prior to May, 1886, there had been some disagreements between the parties in regard to the conduct of the business, and it was undecided whether the agreement would be continued or not. By a provision which was put in the agreement when it was renewed in 1885, the further extension from May, 1886, depended upon the mutual agreement of the parties. On the 4th of May, 1886, the partners wrote a letter asking that the contract be renewed. Correspondence and interviews succeeded, but the agreement was not renewed,

and on June 14 and 17 respectively the partners reiterated their request to Brown for its renewal. On the 19th of June Brown wrote to the partners stating that as the terms of his letter of the 17th were not accepted he thereby revoked the same and he offered to take the stock off their hands and entered into some further details now immaterial.

The letter of Brown dated the 17th of June and referred to in his letter of the 19th, is not in the record, but the evidence leads to the inference that it contained an offer to renew the contract upon terms therein stated. There is no proof that the terms were accepted, and, on the contrary, Brown, in his letter of the 19th of June, says they were not. In the meantime and pending these negotiations the partners had continued the manufacture of the article. As to the practical effect of the correspondence and of the letter of the 19th of June written by Brown to the partners, there is no divergence of evidence. Both Brown and Swett, the defendant, were sworn on the trial and they both agree that they regarded the agreement as terminated from that time, June 19. The partners finished or continued to make the presses up to June 30th after the receipt of the letter, and they furnished returns up to that time and accounted for and paid the royalties due up to that date, but from that time they never made another report and did not consider themselves thereafter as manufacturing under any agreement. Up to that time they had made quarterly reports as to royalties.

The testimony further shows that after June 30th they not only did not manufacture under the agreement, but the defendant maintained that the machine which was manufactured after that date was not identical with the one described in the agreement. The evidence is undisputed that in truth they did not after June 30th manufacture an article which was absolutely and in detail identical with the article mentioned in the agreement, although the referee finds that the two articles are in substance alike. Both parties testified in so many words to the termination of the agreement before July 1, 1886. The defendant was called by the plaintiff as a wit-

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ness on the trial, and he said on examination by his own counsel, that the letter of June 19th ended any attempt on their part to renew the contract; that ended it; there was no correspondence or conversation after that and no attempt made to renew or extend it, and it was not renewed; they sent back to Brown certain articles which were useless to them after the agreement expired and which they could only use under the agreement; they did this by letter June 29th, 1886; on the 4th of July following the partners wrote a letter to Brown giving him a statement of presses made up to June 30th preceding, and notifying him that they had placed amount of royalties on them to Brown's credit; the letter was the final settlement of sales up to that date and no dealings after that were had with Brown, and he never thereafter called upon the partners to make any payment by reason of the agreement or to make any report in regard to it, except that Brown says that possibly he may have asked for a report in the fall of 1886. In June, 1891, it appears from Brown's own evidence that he had a conversation with the defendant upon the subject of the article the defendant had been manufacturing since the termination of the agreement, and in that conversation Brown said that the article which defendant had been thus manufacturing was an infringement on his rights, and defendant had replied to him that if he were of that opinion he had better contest it. The defendant during the time of his manufacturing, after the termination of the agreement, maintained his right (outside of the old agreement and assuming its termination) to manufacture the article in the way he was doing, and claimed that it was not the same article mentioned in the agreement and that it was not any infringement on the rights of Brown. This is incompatible with a manufacture under the agreement. Whether the article manufactured were or were not substantially identical with that described in the agreement, the evidence is clear and uncontradicted that defendant maintained it was not, and that he had the right to manufacture it without regard to any agreement and assuming its termination. Upon this question the evidence is also clear

that defendant was willing to try conclusions with Brown by means of a lawsuit. It is proved and not disputed that the defendant had, subsequent to June 30th, 1886, consulted with counsel relative to the article he was making or proposed to make, and stated or showed the difference between its manufacture and the article as described in the agreement, and that such counsel had advised him that the article he proposed to manufacture or was then manufacturing, was not an infringement on Brown's rights.

On the subject of the termination of the agreement, Brown was called and testified that the agreement was terminated in 1886 and that it was never renewed, and that the letter of June 19th which he wrote was the notice to the partners of the termination of the contract. The witness also said that all matters were settled up between them up to that time and under the agreement as he believed, and that after that he made no new agreement with the partners, and he did not extend the old contract at all; he made no claim for anything in this action prior to June 30th, 1886; at that time he and the partners had not been able to agree about renewing the contract, so it had never been renewed.

Brown further said that the partners never made any quarterly reports subsequent to the one sent him the last of June or forepart of July; he thought he called on them for a report in the fall of 1886, but that so far as he knew, all matters up to the termination of the contract had been settled either by notes or payments in cash. From the fall of 1886 he had never made a demand for a report or for any payment or royalties under the agreement, and none had been made until just before the commencement of this action. This in substance is the uncontradicted evidence of the parties to the agreement. It is seen they both unite in stating it was terminated in June, 1886, and that it never was renewed.

A motion for a non-suit was made upon the ground that plaintiff had shown no liability to pay royalties for the time mentioned in the complaint, which was subsequent to June, 1886. This was denied, and requests to find were made and

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exceptions to their refusal and to the findings as made were duly taken, so that the question is fairly presented whether on this evidence the defendant was bound to pay royalties according to the provisions of an agreement during a time subsequent to the period when the agreement itself, according to the evidence of both parties to it, had terminated.

I think the plaintiff failed to make out a case and that the judgment ought, therefore, to be reversed.

First, it is to be noted that by the terms of the agreement of 1885, it was to expire in May, 1886, and that its renewal depended upon the mutual agreement of the parties and not as theretofore upon the election of the partners to renew it upon giving notice of the time for which they desired such renewal sixty days before its expiration.

There was to be a meeting and agreement of minds before the renewal was to be effected. The evidence shows conclusively and without the least contradiction that no such agreement for a renewal in terms took place, and that no renewal was thus effected. It is true that during the negotiations in May and early June, 1886, the partners manufactured, but the whole thing was regarded by both sides as dead and completely gone after the letter of June 19th was written, and for the articles manufactured or in process of manufacture at that time and up to June 30th settlement was made between the parties, and after that time both parties swear that they regarded the agreement as at an end. As a further evidence of such fact the partners proposed to and did manufacture the same kind of an article but differing slightly in its make up, and they consulted counsel whether it would be an infringement on the Brown patent, and they received a negative answer and so continued to manufacture it with that difference, and never since June, 1886, did the defendant, as he swears, manufacture a single machine covered by the Brown patent. The referee finds that in truth the article manufactured by defendant since that date was substantially like the one mentioned in the agreement. Whether it was or not is not important, because by the uncontradicted evidence

it is shown that the defendant was not assuming or claiming to manufacture under the agreement, but, on the contrary, was openly and persistently manufacturing an article which he claimed a right to manufacture, not arising out of any contract and not depending upon any agreement. And when Brown afterwards tells defendant that his manufacture is an infringement on his, Brown's, rights, defendant answers him in substance that if he think so he had better commence an action to prevent such infringement and thus contest the point at once. This evidence of Brown itself as to a conversation between defendant and Brown, which occurred five years subsequent to the termination of the agreement, is uncontradicted and shows clearly the entire absence of any pretense by either party at that time as to the continued existence of that agreement or that the manufacture by defendant had been continued under or by virtue of such agreement. Brown's own evidence shows that upon this occasion he made no claim that defendant was liable under the agreement for royalties, but only that he was guilty of an infringement upon his patent by reason of manufacturing in the way he had been doing. This would have been impossible if the agreement had been in existence and defendant had continued manufacturing under it. Evidently there was then no thought on either side that the agreement had been in force during this period. Both parties then knew and recognized the fact that they had failed to extend or renew it, and that they had both treated it since June, 1886, as at an end, and in addition to this evidence they both so swore on the trial.

The ground of the liability is, however, stated to rest in the fact that the parties by their action did tacitly agree to renew the contract; that notwithstanding the failure to renew the agreement in terms, it was in reality substantially renewed by the failure of Brown to do anything after the writing of the letter and by the actual manufacture of substantially the same article by the defendant, who thus used the right given him by the agreement which was acquiesced in by Brown, because he did nothing to prevent it, and he thus waived the effect of

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the notice he had once given. By these various acts and omissions it is said the parties tacitly but effectually renewed the agreement, although for how long a time the evidence wholly fails to show. This failure of Brown to take further action subsequent to his letter of June 19 is made to operate as a waiver of his notice contained in such letter, and this waiver by Brown, together with a manufacture of the article on the other side, bring about a renewal which neither party then anticipated. We find a difficulty in implying a renewal which is opposed to the words and acts of the parties. It is plain that a waiver of the notice could not effect the renewal of the agreement. That required the affirmative consent or act of both parties, and without it the old agreement remained useless and non-existent. Neither could the manufacture by the defendant under the conceded facts be regarded as an implied recognition of the binding force of the agreement or as an implied renewal thereof. The act of manufacturing is explained fully by defendant and that explanation is uncontradicted. It was not in any degree a recognition of the existence of the agreement, nor could such recognition or renewal be thereby implied, but, on the contrary, the evidence shows without dispute that the manufacture was under a claim of right not resting on contract and outside of the agreement and without reference to it. It seems to us that to imply a renewal of the agreement on this evidence results in a decision which is so at war with the acts and words of the parties and with the undisputed facts in the case as to rest practically upon no evidence.

Brown, after the giving of the notice and the acquiescence of all parties in the fact that the agreement was not renewed, was not bound to do anything further, nor could the fact of his mere silence while the parties manufactured an article be regarded as a consent to the renewal of the agreement. The important and material fact still remains that it was not the giving of the notice in the letter of June 19th which terminated an otherwise existing agreement. The agreement had terminated already by its own specific terms, and it required

the mutual consent and agreement of both parties to renew it. Their acts already alluded to cannot in reason or justice as we think be held to renew an agreement of this nature.

The learned referee was controlled, as it would seem from his opinion, in the disposition of the case by what he regarded as the binding authority of the case of *Union Manufacturing Co. v. Lounsbury* (41 N. Y. 363), but with unfeigned respect we think he carries the doctrine too far.

After an examination of it, we think that case differs from this in one or two important particulars. The defendants in the case cited were manufacturers under license from the plaintiff and upon conditions stated in the agreement, a violation of which was to forfeit their right to manufacture. The defendants during its existence violated one of its conditions by making a kind of cloth which they had agreed not to manufacture. The plaintiff then notified defendants that on that account they were forbidden from using or exercising the right to manufacture for any purpose whatever. The plaintiff took no other step towards rescinding the agreement, and the defendants continued to manufacture the cloth which the agreement permitted them to manufacture and made no claim so far as the case shows of any right to manufacture the cloth outside of the agreement, but they subsequently refused to pay the price agreed upon, which accrued after the day of notification. Plaintiff, in an action brought upon the agreement, was permitted to recover. It will be noticed that the agreement was in force at the time the plaintiff served the notice. The notice was nothing more than a statement by the plaintiff that he meant to avail himself of and to enforce the forfeiture provided by the agreement. The choice rested with him alone, and when he stated an intention to exercise the right, he was not thereby compelled to do so or to follow it up by resorting to legal measures if the defendants continued to manufacture, notwithstanding his notice. Obviously, they had no right to manufacture and claimed none outside of the agreement. If they did thus continue to manufacture, there is no reason why the plaintiff might not waive his right

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Statement of case.

of forfeiture or rescission and sue for the price coming to him under the agreement. The fact that he does sue shows that he does waive the right existing in him alone to terminate the contract on account of the violation of one of its conditions by the defendants. If he waive the right to terminate the contract, surely the defendants could not be heard to say that nevertheless they elected to terminate it or to hold him to its termination on account of his written notice, although that notice was based on their own violation of one of the provisions of such contract. Here is a totally different case. This agreement terminated by its own language in May, 1886. The manufacture of the article by defendant pending negotiations and up to June 30, was settled for and ended. To renew the agreement some mutual and binding agreement to renew must be shown or an implied renewal must be based upon the words or conduct of the parties. The parties have shown no written renewal and their words and acts we have already seen are wholly opposed to an implied renewal.

The plaintiff has, therefore, failed to show an agreement, and without an agreement to pay royalties this judgment cannot be sustained, and it must, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed. _____

WILLIAM H. MILLER et al., Respondents, v. EDWARD BENJAMIN et al., Appellants.

The right of a vendor to enforce an executory contract for the manufacture and sale of goods will not be forfeited or lost by reason merely of technical, inadvertent or unimportant omissions or defects. While a substantial performance must be shown, a literal compliance as to details which are unimportant is not required.

The question as to whether defects or omissions shown are substantial, or merely unimportant mistakes, is generally one of fact.

Plaintiff contracted to sell and deliver to defendants a specified quantity of slit steel in monthly installments, to be prepared and slit in special sizes, in accordance with specifications to be given by defendants for each month's delivery, the specifications to refer to numbers given in

142 618.
149 444.

142	618
162	490
142	613
164	509

the contract, which, according to the usages of the trade, designated the weight or thickness of the pieces; these numbers were 27 and 29. In an action to recover damages for a refusal on the part of defendants to continue to perform the contract the defense was that they were excused from further performance by reason of omissions or mistakes on plaintiffs' part in sending heavier steel than was called for. The proof tended to show that it was a fact well known to the trade that it was very difficult, if not impossible, to roll cold steel so as to have a uniform thickness and weight, and that a variation of one number could not be regarded as a departure from the contract; that on two occasions when No. 29 were ordered plaintiffs sent No. 27 for part of the order. These were returned by defendants and plaintiffs promptly sent steel of the proper gauge. It did not appear that the mistake caused any material loss or damage to defendants. *Held*, that the deviation did not, as matter of law, amount to a breach of contract on plaintiffs' part; and that the question was properly submitted to the jury, and a finding in plaintiffs' favor was justified.

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made April 16, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a contract by which plaintiffs agreed to sell and defendants to purchase a certain quantity of slit steel.

The complaint claimed damages for a failure by defendants to accept and pay for a portion of the steel, and also asked to recover for the balance remaining unpaid upon that portion of the steel which had been delivered.

The facts, so far as material, are stated in the opinion.

Albridge C. Smith for appellants. When the agreement is determined into which the parties have entered, it is but just and fair that they should be held strictly to it, and all their stipulations we should assume to have been made for a purpose, and to have been considered important by them, and, therefore, cannot be dispensed with. (Benj. on Sales, §§ 690, 895; *Bank of Montreal v. Recknagel*, 109 N. Y. 491; *Hill*

v. *Blake*, 97 id. 216, 220; *Cunningham v. Judson*, 100 id. 189; *Pope v. Allis*, 115 U. S. 363; *Pope v. Porter*, 102 N. Y. 366.) Defendants were not bound to sort over the steel and return the twenty-seven gauge or hold it subject to plaintiffs' orders. Plaintiffs had no right to send both sizes of steel, and cast upon the defendants the burden of sorting it. (*Walker v. Davis*, 18 Atl. Rep. 196.)

R. B. Gwillim for respondents. A substantial performance will entitle to recovery. (*Glacius v. Black*, 50 N. Y. 145; *Phillips v. Gallant*, 62 id. 264; *Woodward v. Fuller*, 80 id. 315; *Dauchey v. Drake*, 85 id. 411; *Heckmann v. Pinkney*, 81 id. 211; *Sinclair v. Talmadge*, 35 Barb. 602; *Van Clief v. Van Vechten*, 130 N. Y. 579; *Couch v. Gutmann*, 134 id. 51.) The evidence disclosed the real motive of the defendants in the attempt to cancel their contract. Questions where the motive of a party enters into the contract must be submitted to the jury as one of fact. (*Sullivan v. N. Y. & R. C. Co.*, 119 N. Y. 355.) These matters of fact upon which the verdict rests having been determined by the jury, this court will not disturb the findings. (*Phillips v. Gallant*, 62 N. Y. 264; *Sinclair v. Talmadge*, 35 Barb. 602.)

O'BRIEN, J. The plaintiffs have recovered upon an executory contract made by them with the defendants on the 15th of March, 1889, whereby the defendants agreed to purchase and the plaintiffs to sell to them one hundred thousand pounds of slit steel of a certain grade and quality to be delivered thereafter at the rate of about twelve thousand five hundred pounds per month from May 1, 1889, to January 1, 1890, specifications for each month's deliveries to be given by the defendants to the plaintiffs in each case during the first week of the month preceding. The defendants were to use the steel in the manufacture of dress extenders worn by ladies and which were in fashion when the contract was made, but, as the proof tended to show, went out of fashion that summer. The plaintiffs in order to be prepared to fill the contract

contracted for the steel abroad to be delivered to them from time to time as the contract required, but as is claimed, by reason of the defendants' refusal to accept delivery, it accumulated on their hands and they were obliged to carry it. About twenty-seven thousand pounds of the steel was delivered. About three months after the execution of the contract complaint was made by the plaintiffs that the defendants failed to send the specifications to enable them to deliver, and in the latter part of August, 1889, the defendants wrote to the plaintiffs to cancel the order or contract, giving as a reason for this action on their part that the plaintiffs persisted in sending them heavier steel than specified in the contract. It seems that the steel had to be prepared and slit in special sizes in order to meet the defendants' wants, and the grade or quality required was designated in the order as Nos. 27 and 29. The judgment was recovered as damages for the non-performance of this contract on the part of the defendants and for a small balance claimed to be due to the plaintiffs and unpaid on account of the steel delivered. There was some dispute with respect to this balance which became a question of fact at the trial. The proof tended to show that the defendants failed to furnish the specifications for the monthly delivery of steel as required by the contract and the order requesting the contract or orders to be canceled amounted to a refusal on their part to further perform. The only question of law in the case is raised by the defendants' contention that they were excused from further performance by reason of omissions or mistakes on the part of the plaintiffs in sending heavier steel than was called for by the specifications. The numbers specified in the contract were intended to designate the weight or thickness of the slit steel according to the usages of the trade. The proof tended to show that it was a fact well known and understood in the trade that it is very difficult if not impossible to get cold steel rolled accurately so as to have a perfectly even thickness and uniform weight. A slight variation in weight and thickness is expected on account of this difficulty, and so long as this variation does

not exceed one gauge or number it could not be regarded as a departure from the contract. Thus, a contract for this kind of steel, specifying 27 or 29 gauge, might be filled by 28 or 30. The proof tended to show that in June and July following the execution of the contract the plaintiffs sent on at least two occasions some of the 27 gauge instead of 29 gauge which had been specified. The defendants returned two barrels in June and two more in July, and the plaintiffs promptly replaced these shipments with goods of the proper grade. These slight variations were evidently mistakes in filling the specifications and were so understood by both parties. They were promptly corrected by the action of the plaintiffs in replacing the rejected goods at their own expense by a like quantity which conformed to the specification. It does not appear that the mistake caused any material damage or loss to the defendants. The deviation from the contract occurred in such a way and was of such a character that it did not, as matter of law, amount to a breach on the part of the plaintiffs. The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent or unimportant omissions or defects. A substantial performance must be established in order to entitle the party claiming the benefit of the contract to recover, but this does not mean a literal compliance as to details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether in any case such defects or omissions are substantial or merely unimportant mistakes that have been or may be corrected is generally a question of fact. (*Glacius v. Black*, 50 N. Y. 145; *Phillip v. Gallant*, 62 id. 264; *Woodward v. Fuller*, 80 id. 315; *Heckmann v. Pinkney*, 81 id. 211; *Dauchey v. Drake*, 85 id. 411; *Van Clief v. Van Vechten*, 130 id. 579; *Couch v. Gutmann*, 134 id. 51.) In so far as that question was involved in this case, the learned trial judge properly submitted it to the jury to determine whether there was such a failure on the part of the plaintiffs to furnish

and deliver the steel of such particular sizes and weight called for by the contract and specifications as justified the defendants in terminating the contract. The instructions on this point were full and in accordance with the rules of law referred to, and the verdict was in favor of the plaintiffs. Some collateral questions arose upon the trial which have been examined and some exceptions appear in the record, but they involve no error of law which can be said to have prejudiced the defendants. The submission of the whole case to the jury disposed of it in a manner sufficiently favorable to the defendants.

The judgment must, therefore, be affirmed.

All concur.

Judgment affirmed.

MEMORANDA

OF

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

HENRY C. SHERBURNE, Appellant, *v.* EDWARD A. TAFT et al.,
Respondents.

Where, in an action for an accounting, the defendants proved a full settlement in regard to the whole transaction, *held*, that the court was not bound to retain the case as against one of the defendants, to enable plaintiff to recover upon a cause of action against him growing out of the settlement, and that the complaint was properly dismissed.

(Argued February 28, 1894 ; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was for an accounting as to the proceeds of the sale of one-half of the capital stock of the New York and Boston Dispatch Express Company, and of the Kinsley Express Company, which sale the complaint alleged was made to the Adams Express Company in March, 1888.

The plaintiff claimed that he was the equitable owner of three-eighths of the stock so sold, and that the defendant Taft held the same as trustee for him ; that a portion of the proceeds to which he is entitled was retained by Taft or paid over to the defendants Spooner and Hoey without authority ; that the sale was unauthorized and a breach of trust on the part of Taft.

The complaint was dismissed as to defendants Spooner and Hoey, because as to them the court held that the action was one to enforce an illegal agreement, and as to defendant Taft on the same ground, and also upon the ground that there had been a settlement between Taft and the plaintiff and a note

given by Taft for a balance of account on which the plaintiff had a remedy in an action at law.

Further facts are stated in the opinion.

"We have given this case a good deal of consideration but in the view now taken it is only necessary to state the conclusions we have arrived at.

"The evidence and findings of the court show a gross violation of one of the most firmly established principles of law on the part of the two defendants who were trustees of the Adams Company, and they also show that the fruits of such violation were received and partaken of by the other defendant and by the plaintiff with full knowledge of the illegal and corrupt character of the whole transaction.

"The court below treated the contract as illegal and refused its aid to any of the parties. There is a claim made that even if the contract were of an illegal character, yet it was so far completed that the only question left was in regard to a proper division of the profits among the parties to the contract and that in such event the transaction comes within the rule laid down in *Brooks v. Martin* (2 Wall. 70).

"Whether this case comes within that rule, and whether if it did, the rule itself has been affirmed in this state, it is not now necessary for us to decide. Nor is it necessary to decide as to the power of the court to itself refuse to aid where the parties to the illegal transaction do not take the objection. Some of us would hesitate long before deciding either point in favor of the plaintiff.

"Here, however, we have other facts. The action is brought for a general accounting by all the defendants to and with the plaintiff. The case shows and the court finds that there was a full and complete settlement of accounts in regard to the whole transaction between plaintiff and Taft in Paris, which we hold to be a good answer to this action. The plaintiff alleged that the so-called settlement was only a conditional one, but the court finds against him on that point. He also attempted to prove that it was a settlement induced by fraudulent representations, but he failed in his attempt and the court finds the settlement to have been valid.

"This action for an accounting between all the parties can-

not, therefore, be maintained, and the cause of action against the defendant Taft alone upon the settlement at Paris is a wholly separate and different one from that set forth in the complaint herein. The proof in this case left that cause of action unproved in its entire scope and meaning, and the court was, therefore, right in dismissing the complaint. It was not bound to retain the case as against one only of the several defendants for the purpose of enabling the plaintiff to prove another and different cause of action against him alone.

"We think the judgment should be affirmed, with costs."

D. M. Porter for appellant.

Elihu Root for respondents.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed. _____

THE W. J. JOHNSTON COMPANY (Limited), Appellant, v.
WALTER T. HUNT et al., Respondents.

(Argued March 7, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 16, 1892, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Circuit.

Thomas J. Keigharn for appellant.

John Henry Hull for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

CHARLES J. WEBB et al., Appellants, v. WILLIAM T. PETTENGILL et al., Respondents.

(Argued March 7, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Otto Horwitz and *Z. S. Westbrook* for appellants.

W. L. Van Denbergh for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

SIMON RAWITSER et al., Appellants, v. WILLIAM T. PETTENGILL et al., Respondents.

(Argued March 7, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Otto Horwitz and *Z. S. Westbrook* for appellants.

W. L. Van Denbergh for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

HERBERT CECIL PELLY, Respondent, v. ANDREW J. ROBINSON, Impleaded, etc., Appellant.*

(Argued March 8, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Eugene H. Pomeroy for appellant.

Lucien Birdseye for respondent.

Agree to reverse and grant new trial on authority of *Pelly v. Naylor* (139 N. Y. 598).

All concur.

Judgment reversed. _____

WILLIAM SUTTON, Respondent, v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

(Argued March 8, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Lewis E. Carr for appellant.

John M. Gardner for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported on former appeal, 139 N. Y. 598.

WALTER VAN HOUTEN, Respondent, v. CHARLES FLEISCHMANN,
Appellant.

(Argued March 8, 1894 ; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 7, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. Bainbridge Smith for appellant.

James McKeen for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

HARRISON A. TUCKER et al., Appellants, v. ALEXANDER
MCLEAN et al., Respondents.

(Submitted March 9, 1894 ; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Charles M. Stafford for appellants.

James and Thomas H. Troy for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ROXANNA J. SLEEPER, Respondent, *v.* SIDNEY S. SLEEPER,
Appellant.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1892, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Adelbert Moot for appellant.

Wallace Thayer for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ELIZA J. MURRAY, Appellant, *v.* CATHARINE MOLLOY et al.,
Respondents.

(Submitted March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made March 10, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee.

S. S. Hemingway for appellant.

Frederick Cobb for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

142 a	626
158	284
158	289

CHAUNCEY WHITCHER, Appellant, *v.* HOLLAND WATER WORKS
COMPANY, Respondent.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Frank C. Laughlin for appellant.

Wallace Thayer for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

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169	127

CHARLES J. HERDT, Respondent, *v.* THE ROCHESTER CITY AND
BRIGHTON RAILROAD COMPANY, Appellant.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Theodore Bacon for appellant.

Eugene Van Voorhis for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

F. CLAYTON STEVENS, Respondent, *v.* THE METROPOLITAN LIFE
INSURANCE COMPANY of New York, Appellant.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

William H. Arnoux for appellant.

Edward F. O'Dwyer for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THE PEOPLE *ex rel.* HENRIETTA FISK, Appellant, *v.* BOARD OF
EDUCATION OF THE CITY OF NEW YORK, Respondent.

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 12, 1893, which affirmed on certiorari a determination of the defendant removing the relator from the position of principal in a public school in the city of New York.

B. C. Chetwood for appellant.

R. G. Beardslee for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

GILES E. LEACH et al., Respondents, v. CHARLES F. LINDE,
Appellant.*

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 17, 1893, which affirmed an order of Special Term denying a motion to vacate an order of arrest.

Edward S. Clinch for appellant.

Lorenzo Semple for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

In the Matter of the Accounting of CHARLES E. GALLAGHER,
Late Committee, etc., of HESTER A. BABCOCK, a Lunatic.
CHARLES E. GALLAGHER, Appellant, v. EMMA H. BABCOCK,
Respondent.

(Submitted March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which modified and affirmed as modified a judgment entered upon a decree of the county judge of Cattaraugus county.

William H. Henderson for appellant.

Hudson Ansley for respondent.

Agree to affirm: no opinion.

All concur.

Judgment affirmed. _____

* Reported below, 73 Hun. 246.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
PHILIP DERRINGER, Appellant.

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 17, 1893, which affirmed a judgment of the Court of General Sessions entered upon a verdict convicting defendant of the crime of manslaughter in the second degree.

B. P. Ryan for appellant.

John D. Lindsay for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
ALEXANDER B. TERWILLIGER, Appellant.*

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 14, 1893, which affirmed a judgment of the Court of Sessions of Ulster county entered upon a verdict convicting defendant of the crime of rape.

William Lounsbery for appellant.

F. A. Westbrook for respondent.

Agree to affirm on prevailing opinion below.

All concur.

Judgment affirmed.

* Reported below, 74 Hun, 310.

SIMON BUTTS, Appellant, *v.* ADDISON B. FILLMORE,
Respondent.

(Argued March 12, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 29, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term, and also affirmed an order denying a motion for a new trial.

John Desmond for appellant.

George D. Forsyth for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THE PEOPLE *ex rel.* JAMES M. PATTERSON, Appellant, *v.*
EDWARD REED, Respondent.*

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 2, 1892, which affirmed an order of the county judge of Warren county dismissing a writ of habeas corpus, and remanding the relator to the custody of the defendant.

Louis M. Brown for appellant.

Charles J. Buchanan for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

* Reported below, 64 Hun, 453.

JAMES McNEIL, as Administrator, etc., Appellant, *v.* THE
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
Respondent.

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme
Court in the second judicial department, entered upon an
order made July 28, 1893, which affirmed a judgment in favor
of defendant entered upon an order dismissing the complaint
on trial at Circuit.

John W. Lyon for appellant.

Lewis E. Carr for respondent.

Agree to affirm; no opinion.

All concur, except ANDREWS, Ch. J., not voting.

Judgment affirmed.

GEORGE M. BEEBE, Respondent, *v.* THE BOARD OF SUPERVIS-
ORS OF SULLIVAN COUNTY et al., Appellants.*

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme
Court in the third judicial department, entered upon an order
made May 3, 1892, which reversed a judgment in favor of
defendants entered upon a decision of the court on trial at
Special Term and ordered a new trial.

Lewis E. Carr for appellants.

John A. Thompson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 64 Hun, 877.

HOWARD N. BAILEY, Respondent, *v.* SARAH A. BAILEY,
Appellant.*

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

W. E. Osborn for appellant.

T. C. Campbell for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JAMES B. HORTON, Respondent, *v.* WILLIAM H. S. WOOD,
Appellant.

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Walter Edwards for appellant.

Andrew J. Provost for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

* Reported below, 45 Hun, 278.

ERNEST DE BAVIER et al., Respondents, v. HUGO FUNKE,
Appellant.

(Argued March 18, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 20, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

W. P. Knapp for appellant.

Samson Lachman for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

SEBASTIAN GILZINGER, Respondent, v. THE SAUGERTIES
WATER COMPANY, Appellant.*

(Argued March 13, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

A. T. Clearwater for appellant.

Howard Chipp for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 66 Hun, 173.

WALTER VAN HOUTEN, Respondent, v. CHARLES FLEISCHMANN,
Appellant.

(Argued March 8, 1894 ; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 7, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. Bainbridge Smith for appellant.

James McKeen for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

HARRISON A. TUCKER et al., Appellants, v. ALEXANDER
MCLEAN et al., Respondents.

(Submitted March 9, 1894 ; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Charles M. Stafford for appellants.

James and Thomas H. Troy for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ROXANNA J. SLEEPER, Respondent, *v.* SIDNEY S. SLEEPER,
Appellant.

(Argued March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1892, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Adelbert Moot for appellant.

Wallace Thayer for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ELIZA J. MURRAY, Appellant, *v.* CATHARINE MOLLOY et al.,
Respondents.

(Submitted March 9, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made March 10, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee.

S. S. Hemingway for appellant.

Frederick Cobb for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

EDWIN W. BUTLER, Respondent, *v.* GARRETT D. CLARK et al.,
Appellants.

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 16, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

William H. Arnoux for appellants.

Henry P. Starbuck for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

FERDINAND C. BAMMAN, Appellant, *v.* THERESIA BINZEN,
Respondent.*

(Argued March 15, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 7, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Mark Ash for appellant.

Thomas McAdam for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 65 Hun, 39.

JENNIE R. SHERMAN, Respondent, *v.* THE VILLAGE OF
ONEONTA, Appellant.

(Argued March 16, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

W. H. Johnson for appellant.

Isaac H. Maynard for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THOMAS D. HURST, Respondent, *v.* TROW'S PRINTING AND
BOOKBINDING COMPANY et al., Appellants.

(Argued March 16, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Frederic R. Kellogg for appellants.

Andrew Gilhooly, for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

In the Matter of the Petition of the **THIRD METHODIST EPISCOPAL CHURCH** in the City of Brooklyn to Dissolve the Corporation, etc.

(Argued March 19, 1894; decided April 10, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 13, 1893, which affirmed an order of the Special Term dissolving the petitioner.

Frank Moss for appellant.

William J. Groo for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

FRANCES CONNOLLY, Respondent, v. BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY, Appellant.

(Argued March 19, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Henry G. Danforth for appellant.

Eugene Van Voorhis for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. CALEB
W. MITCHELL, Respondent.

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(Argued March 19, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 8, 1892, which reversed a judgment of the Court of Sessions of Saratoga county entered upon a verdict convicting the defendant of keeping a gambling house in violation of section 343 of the Penal Code.

The following is the *mem.* of opinion in full:

"The defendant was charged with keeping a gambling house and was found guilty by the jury and sentenced to pay a fine of \$500. Upon appeal from the judgment of conviction, it was reversed on the facts by the General Term and the discharge of the prisoner ordered. The People then appealed to this court. The appeal, however, should be dismissed. The power to review the facts ended with the action of the General Term and they have exercised it by ordering a reversal of the conviction; placing their order expressly upon the facts and not upon the law. The appeal presents no exception and this court, sitting only for the correction of errors of law, is not required further to review the questions of fact.

"The appeal should be dismissed."

T. F. Hamilton for appellant.

J. S. L'Amoreaux for respondent.

GRAY, J., reads *mem.* for dismissal of appeal.

All concur.

Appeal dismissed. _____

LOUISA FREEMAN, as Administratrix, etc., Appellant, v. THE
GLENS FALLS PAPER MILLS COMPANY, Respondent.

(Argued March 19, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon

an order made July 8, 1893, which affirmed a judgment in favor of defendant entered upon a verdict.

T. F. Hamilton for appellant.

J. S. L'Amoreaux for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JOHN MCGOLDRICK, as Administrator, etc., Respondent, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

(Argued March 20, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. D. Prescott for appellant.

T. G. Curtin and *John D. McMahon* for respondent.

Agree to affirm; no opinion.

All concur, except FINCH and GRAY, JJ., not voting.

Judgment affirmed. _____

JOHN E. HARRINGTON, Respondent, v. THE FRANKLIN FIRE
INSURANCE COMPANY of Philadelphia, Appellant.

(Argued March 21, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which reversed a judgment in favor of defendant entered upon a verdict directed by the court and granted a new trial.

Evert Fowler for appellant.

John E. Van Etten for respondent.

Agree to affirm on opinion below.

All concur, except EARL and BARTLETT, JJ., dissenting.

Judgment affirmed.

CHARLES R. KNOWLES, Respondent, v. THE AMERICAN INSURANCE COMPANY of Boston, Mass., Appellant.*

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(Argued March 21, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Jacob L. Ten Eyck for appellant.

S. S. Hatt for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

FREDERICK L. DEGENER, Respondent, v. JOHN T. UNDERWOOD et al., Appellants.

(Argued March 21, 1894; decided April 10, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 15, 1892, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

James A. Hudson for appellants.

J. E. Ludden for respondent.

Agree to affirm under section 3251 of the Code of Civil Procedure; no opinion.

All concur.

Judgment affirmed.

* Reported below, 66 Hun, 220.

THE PEOPLE ex rel. JOHN L. RYDER, Respondent, v. THE
CLERK OF THE BOARD OF SUPERVISORS OF KINGS COUNTY,
Appellant.

(Argued April 9, 1894; decided April 17, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order made March 5, 1894, which affirmed an order of Special Term directing the issuance of a writ of peremptory mandamus to the defendant herein.

The following is the *mem.* of decision:

"This is a controversy between John F. Ryder upon the one part, and Richard L. Baisley upon the other, to determine which is the rightful supervisor of the town of Flatlands, Kings county, for the current year. Both parties desire to have the controversy determined upon its merits, and the question whether it can properly be determined in this proceeding by mandamus against the clerk of the board of supervisors has not been discussed and is not noticed in the briefs submitted to us. We do not, therefore, determine it.

"We are satisfied that the decision of the court below is right upon the merits, and we affirm its decision upon the opinion there pronounced.

"The order should be affirmed, with costs."

James C. Church for appellant.

George F. Elliott for respondent.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN EICHLER, Appellant.

(Submitted April 9, 1894; decided April 17, 1894.)

MOTION to dismiss an appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order which affirmed a judgment of the

General Sessions of the Peace of the county of New York entered upon a verdict convicting defendant of the crime of blackmail.

John R. Fellows, District Attorney, for motion.

John Fennell opposed.

Agree to dismiss appeal; no opinion.

All concur.

Motion granted. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
FRANK W. CLARK, Appellant.

(Submitted April 9, 1894; decided April 17, 1894.)

MOTION to dismiss appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order which affirmed a judgment of the Court of General Sessions of the Peace of the city of New York entered upon a verdict which convicted defendant of the crime of forgery in the second degree.

John R. Fellows, District Attorney, for motion.

Agree to dismiss appeal; no opinion.

All concur.

Motion granted. _____

ANGEL K. JORGENSEN, Appellant, v. FLUVIUS S. SQUIRES
et al., Respondents.

(Argued April 9, 1894; decided April 17, 1894.)

MOTION to open default.

William B. Tullis for motion.

Douglas A. Levien, Jr., and *Robert A. Johnston* opposed.

Agree to grant motion on payment of fifty dollars, within fifteen days after service of notice of entry of order; no opinion.

All concur.

Motion granted.

EDWARD L. MILHAU, Individually and as Executor, etc., Appellant, v. LOUIS JOHN DE G. MILHAU et al., Respondents.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 29, 1893, which affirmed an order of Special Term directing plaintiff's attorney to accept a notice of appearance.

Edward C. Delavan, Jr., for appellant.

Gerrard Irvine Whitehead for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. THE MADISON SQUARE BANK, Defendant.

In the Matter of the Petition of GEORGE T. FITZGERALD, Respondent, v. RECEIVERS OF MADISON SQUARE BANK, Appellants.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 18, 1894, which reversed an order of Special Term directing the receivers of the Madison Square Bank to retain out of funds intended to pay dividends certain moneys, and to pay over the same to the State Trust Company.

Moses Weinman for appellants.

Lyman W. Redington for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

In the Matter of the Assessment for Improving EAST EIGHTEENTH STREET in the Town of Flatbush from Church Avenue to the Town Line.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1894, which confirmed proceedings and assessment of commissioners and ordered that a stay granted at Special Term be vacated.

John H. Kemble for appellant.

William E. C. Mayer for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

DANIEL W. TALLMADGE et al., Appellants, v. PHINEAS C. LOUNSBURY, as Treasurer, etc., Respondent.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made February 5, 1894, which denied a motion by plaintiffs for an order to amend the judgment roll.

Alexander S. Bacon for appellants.

Joseph G. Gay for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

COLORADO STATE BANK, Respondent, v. PATRICK H. GALLAGHER, Appellant.

(Argued April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 21,

1891, which dismissed an appeal from a judgment in favor of defendant entered upon an order of Special Term, overruling a demurrer to the answer and dismissing the complaint.

L. R. Beckley for appellant.

George W. Van Slyck for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed. _____

ROBERT PLAUT, Respondent, *v.* ROBERT L. MOORES et al.,
Appellants.

(Submitted April 9, 1894; decided April 24, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1893, which affirmed orders of the Special Term requiring the appellant La Fayette R. Beckley to complete a purchase made by him at a sale under judgment of foreclosure herein.

L. R. Beckley, appellant, in person.

G. J. Wiederhold for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COM-
PANY, Appellant.

(Argued April 10, 1894 ; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 4, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

John M. Bowers for appellant.

T. E. Hancock, Attorney-General, for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

CORNELIUS N. BLISS et al., Respondents, v. DANIEL E. SICKLES et al., Appellants.

Where plaintiff's proof is defective on some point which is capable of being supplied, but no question is raised in reference thereto on the trial, and a verdict is rendered for plaintiff, the court, on appeal, will assume that proof of the omitted fact was waived, or that such fact was conceded.

In an action of replevin, where plaintiff sought to recover goods sold on the ground that the sale was induced by fraudulent representations on the part of the purchasers, similar representations made by them to a commercial agency, concurrently with the sale in question, upon the strength of which other merchants, who were subscribers to the agency, also sold goods to the same purchasers, were offered and received in evidence upon the question of fraudulent intent. *Held*, no error.

(Argued April 11, 1894; decided April 24, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 16, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action of replevin brought by the plaintiffs, who compose the firm of Bliss, Fabyan & Co., originally against the defendant Sickles alone, to recover the possession of certain merchandise sold and delivered by the plaintiffs to the defendants Sigmund Fechheimer and John Rau, composing the firm of Fechheimer, Rau & Co., which sales and deliveries, as alleged by the plaintiffs, were procured by means of the fraud and deceit of the vendees.

Subsequent to the deliveries of the merchandise in question, Fechheimer, Rau & Co. confessed judgments to certain of their creditors, and under the executions issued upon these

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judgments the property was levied upon and seized by the defendant Sickles, at the time sheriff of the county of New York.

Demand for the return of the property was thereafter duly made upon the sheriff, and this demand not being complied with, action was brought, and the goods were replevied and taken into the plaintiff's possession.

Thereafter, upon their own motion, Sigmund Fechheimer and John Ran, and the Hanover National Bank and Central National Bank, under whose executions the sheriff had levied, were added as parties defendant.

The plaintiffs claimed the right to rescind the contract of sale and to take the merchandise upon the ground that the property was obtained from them by fraud. The alleged wrong was charged to have been perpetrated by means of a statement set forth in the case, which the plaintiffs claim was delivered to them to induce the sale of the goods referred to, and upon which they relied. The defendants claimed that this document was never delivered to the plaintiffs nor intended for them as a basis of any credit, but that it was handed to Cornelius N. Bliss, one of the plaintiffs, in his capacity as vice-president of the Fourth National Bank, to procure the discount of certain notes for the accommodation of defendants, which notes were fully paid before the failure.

The following is the opinion in full:

"The question decided in *Wise v. Grant* (140 N. Y. 593) was not raised on the trial. The motion for non-suit made in behalf of all the defendants, on the ground that no cause of action had been proved against either of the defendants, did not suggest the point now taken. If the attention of the counsel for the plaintiffs had been drawn to the objection now made we cannot say that proof might not have been supplied showing that the contract of sale had been rescinded by the vendors prior to the levy and seizure by the sheriff. The court had jurisdiction of the controversy, and objections which might have been obviated, if made, cannot be taken for the first time on appeal. Where the proof is defective on some point which is capable of being supplied, but no question is raised on the trial, the court on appeal will

assume that proof of the omitted fact was waived, or that the fact as to which the proof was defective was conceded. (*Blair v. Flack*, 141 N. Y. 56; *Reeder v. Sayre*, 70 id. 190.) The other questions in the case were considered by the General Term and none of them require a reversal of the judgment. No attempt was made on the trial to justify the statement made by Fechheimer, Rau & Co. to Bliss, Fabyan & Co., in December, 1889. It was grossly untrue. It purported to be a detailed statement of the assets and liabilities of the firm in July, 1889, showing on its face that the firm at that time had a surplus of over \$188,000, whereas the undisputed evidence is that the firm was then insolvent. Fechheimer, Rau & Co. furnished a copy of the July statement to Bliss, Fabyan & Co., in response to the request of Mr. Bliss for an account of their affairs, and stated that the firm was as well off in December as in July.

"There was a controversy on the trial as to whom the representation contained in the statement was made. It was claimed by the defendants that the statement was furnished to Mr. Bliss as vice-president of the Fourth National Bank, for the use of the bank, and was not intended for the use of the firm of which Mr. Bliss was a member, or as an inducement for credit with that firm. On the other hand, it was claimed that it was furnished for the use of Bliss, Fabyan & Co. as a foundation for credit with that firm, and that Mr. Bliss, who aided the firm of Fechheimer, Rau & Co. in procuring discounts at his bank, sent the statement to the bank for its information as to the standing of the firm.

"The issue was submitted to the jury. The court charged in substance that if the statement was furnished by Fechheimer, Rau & Co. for the use of the bank, and was not intended as a representation to Bliss, Fabyan & Co., the plaintiffs could not recover. The jury found for the plaintiffs on this issue. This finding disposed of the only real controversy in the case, since the untruth of the statement was scarcely controverted, and that the plaintiffs relied upon it in extending the credit was amply shown.

"The question whether the statement made to Dun's agency in December, 1888, re-affirmed by Fechheimer, Rau & Co. in

July, 1889, and upon the faith of which the firm of Oelberman, Domerich & Co., subscribers to the agency, sold goods on credit to Fechheimer, Rau & Co. early in 1890, and contemporaneously with the sales made by Bliss, Fabyan & Co., was competent evidence upon the question of the fraudulent intent of Fechheimer, Rau & Co. in making the statement of December, 1889, to Bliss, Fabyan & Co. is of little importance. As the case stood upon the issues actually litigated, the plaintiffs' case needed no support upon that question. But we are inclined to agree with the view of the General Term, that this evidence was competent.

"The judgment should be affirmed."

Alexander Blumenstiel for appellants.

Frederic R. Kellogg for respondents.

ANDREWS, Ch. J., reads for affirmance.

All concur.

Judgment affirmed. _____

JANE TEETER, Respondent, v. ANDREW TEETER et al.,
Appellants.

(Argued April 11, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

D. C. Bouton for appellants.

M. N. Tompkins for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALBERT F. GESCHEIDT, as Executor, etc., Appellant, v.
FREDERIKA DRIER et al., Respondents.

(Argued April 11, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Lucius L. Van Allen for appellant.

Wilson Brown, Jr., for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ROSABELLA LANGWORTHY, Respondent, v. THE VILLAGE OF
OLEAN, Appellant.

(Argued April 11, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Fred L. Eaton for appellant.

J. H. Waring for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JOHN F. MULVANEY, Jr., Respondent, v. THE BROOKLYN
CITY RAILROAD COMPANY, Appellant.

(Argued April 11, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made Decem-

ber 27, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Samuel D. Morris for appellant.

Jesse Johnson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

ALPHEUS W. MONTGOMERY, Respondent, *v.* JAMES M. WATERBURY et al., Appellants.

(Argued April 12, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 3, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

J. E. Hindon Hyde for appellants.

Henry G. Atwater for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

DANIEL W. MOORE, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued April 12, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made December 30, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

James Fraser Gluck for appellant.

John Cunneen for respondent.

Agree to affirm ; no opinion.

All concur, except FINCH, J., not sitting.

Judgment affirmed.

JOHN HUGHES, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued April 12, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made December 30, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

James Fraser Gluck for appellant.

John Cunneen for respondent.

Agree to affirm ; no opinion.

All concur, except FINCH, J., not voting.

Judgment affirmed.

MEYER JONASSON, Appellant, v. EDWARD E. EAMES et al., Respondents.

(Argued April 12, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the January term, 1893, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Circuit.

Alexander Blumenstiel for appellant.

S. F. Kneeland and *Charles E. Rushmore* for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

AUGUSTUS C. POHL, Respondent, v. CHARLES E. PONTIER et al.,
Appellants.

(Argued April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the December term, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Charles Goldzier for appellants.

Alexander Blumenstiel for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

PATRICK MARTIN, Appellant, v. VALENTINE COOK et al.,
Respondents.

(Submitted April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 17, 1891, which sustained plaintiff's exceptions to an order of the court dismissing the complaint on trial at Circuit, and overruled all other exceptions and directed judgment in favor of defendants.

George M. Curtis for appellant.

Edward M. Burghard for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

PATRICK SHEAHAN, Appellant, v. THE NATIONAL STEAMSHIP COMPANY (Limited), Respondent.*

(Argued April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 18, 1892, which overruled plaintiff's exceptions to the rulings of the judge at Circuit, who dismissed the complaint and granted a new trial.

Dennis Sheahan for appellant.

John Chetwood for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

CHAUNCEY H. SKIDMORE, Respondent, v. ANCHOR BREWING COMPANY, Appellant.

(Argued April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William G. Valentine for appellant.

Augustus M. Price for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 66 Hun, 43.

LILLIAN M. SMITH, Respondent, *v.* SARAH J. SMITH, Impleaded,
etc., Appellant.

(Submitted April 13, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which overruled defendant's exceptions, denied a motion for a new trial and affirmed an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

George W. Sandford for appellant.

Thomas I. Mount for respondent L. M. Smith.

N. S. Ackerly for respondent Brown.

R. H. Smith for respondent Phyfe.

Thomas S. Strong for respondent C. L. Smith.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JOSIAH J. WHITE, Appellant, *v.* GEORGE C. WOOD et al.,
Respondents.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The following is the opinion in full:

"This case comes here for the second time on an appeal from a judgment of the General Term of the second department affirming a judgment dismissing the complaint. The first appeal was from a judgment affirming a judgment in favor of plaintiff after a trial. This court reversed the judgment and ordered a new trial. (*White v. Wood*, 129 N. Y. 527.) At the new trial the complaint was dismissed on the

ground that the questions sought to be litigated had been settled by this court in the decision above referred to. The plaintiff is a bondholder of the Chattaroi Railway Company, a Kentucky corporation, and the defendants are trustees for the bondholders under an agreement executed pending the foreclosure of a mortgage securing the bonds of the company, which gives them, among other things, the power to purchase the property for the benefit of the bondholders. These trustees were to sell the property at not less than a price indicated, and failing in that they were to form a new corporation and make a certain disposition of its stock. The plaintiff brings this action, alleging substantially that the defendants have violated the agreement creating them trustees and entered into a contract with a third party which is hostile to the said agreement and beneficial to themselves.

"On the first trial of this action both parties put in their proofs, and upon a full consideration of them this court reversed a judgment in favor of the plaintiff. The plaintiff's counsel now insists that the present record is entirely different from the former one, and presents a new question. This requires us to look into the history of this litigation as disclosed by the former appeal. The defendants, acting under the trust agreement, having purchased the property at the foreclosure sale, were unable to sell on the terms indicated by the trust agreement, and, therefore, they proceeded to organize a new company under the laws of Kentucky, as they were required to do. In July, 1889, they filed articles of incorporation of a new company, called the Ohio and Big Sandy Railroad Company, by which the capital was fixed at \$2,000,000. The mortgage foreclosed secured the payment of two issues of bonds, aggregating \$1,000,000, of which there were outstanding \$994,000. The certificate of the new company provided that the \$2,000,000 of stock should be issued *pro rata* as paid-up capital stock, in exchange for receipts issued on deposit of the sinking fund and gold bonds of the Chattaroi Railway Company, which aggregated \$994,000.

"The statutes of Kentucky provide that the capital stock and bonds of a railroad company, organized by the purchasers of a railroad at judicial sale, shall not exceed in the aggregate

the original cost of the construction of the railroad and equipment purchased, and such sum as may be necessary to complete the same. In order to comply with these statutory provisions, which had been overlooked in filing the first certificate, a new certificate of incorporation was filed in August, 1889, fixing the nominal amount of the capital stock at \$2,000,000, and providing that \$994,000 should be issued to and divided among bondholders as against their property conveyed to the new company, and that the balance of said capital stock might be disposed of by the board of directors, to be paid in upon the calls of the board. The first certificate was abandoned. The obvious intention of the new certificate was not only to compensate the original bondholders for the property conveyed to the new company, but to raise the necessary money to carry out the scheme contemplated by the trust agreement. It was by reason of this effort of the trustees to dispose of a portion of the new stock for cash under the provisions of the second certificate that plaintiff was led to begin this action. The complaint sets up the facts, and prays judgment that the defendants be restrained from conveying the franchise or property of the said Chattaroi Railway Company over to the said Ohio & Big Sandy Railroad Company, or other persons or corporations, excepting to the said Ohio & Big Sandy Railroad Company, upon the issuing of its said \$2,000,000 of stock and the distribution thereof *pro rata* among the said bondholders; that the defendants be restrained from disposing of said franchise and property under any other agreement or in any other way, or from receiving the sum of \$56,000 or any other sum to their own use; also prayed for an accounting and further relief. A reference to the former opinion of this court (129 N. Y. 527) will show that these various questions were disposed of as presented by the prayer for relief. It was held that the complaint sought to restrain transfers which had been made before the commencement of this action, and the judgment in that respect was ineffectual for any purpose. The filing of the first and second certificates of incorporation of the Ohio & Big Sandy Railroad Company, and the disposition of stock under the latter, were fully considered, and the issue of stock as contemplated approved.

The transaction as to the \$56,000 note was examined and also approved. The case was completely disposed of as then presented.

"We now come to the consideration of the second trial and the contention of plaintiff that the record is changed and a new question presented. The proceedings were very brief. The plaintiff put in evidence five receipts of the Union Trust Co. of New York for the twenty-seven bonds of the Chattaroi Railway Company deposited by him with the trust company, subject to the trust agreement. Also the first article of incorporation of the Ohio & Big Sandy Railroad Company, filed in July, 1889. Plaintiff then offered in evidence the construction and equipment account from the ledger of the Chattaroi Railway Company, which, on objection, was excluded. Plaintiff thereupon rested. Defendant also rested. On motion of defendant the complaint was dismissed. This disposition of the case was proper, as the former decision of this court disposed of all the questions presented by the present record. This court having held that the complaint sought to restrain transfers by the trustees under the trust agreement which had been made before the commencement of this action, and the judgment in that respect was ineffectual for any purpose, the offer in evidence of the construction and equipment account, as contained in the ledger of the Chattaroi Railway Company, as tending to show the cost of the road and the impropriety of these transfers, was properly denied. This evidence was immaterial in view of the former decision, without regard to its competency as against the defendants. It is unnecessary to pass on this latter question. We do not deem it important to consider the various points discussed on the argument and in the briefs, as the present record presents no new question and the judgment must be affirmed, with costs."

Edward M. Grout for appellant.

Wheeler H. Peckham for respondents.

BARTLETT, J., reads for affirmance.

All concur, except PECKHAM, J., taking no part.

Judgment affirmed.

ALBERT GLASER, Appellant, *v.* DANIEL CARROLL et al.,
Respondents.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Special Term.

H. K. Coddington for appellant.

Earley & Pendergast for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

GUSTAV DANIEL, Respondent, *v.* THE NEW YORK NEWS
PUBLISHING COMPANY, Appellant.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 7, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Roger M. Sherman for appellant.

S. L. Samuels for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

THE PENN MUTUAL LIFE INSURANCE COMPANY, Respondent,
v. EDWIN C. BRADLEY, Appellant.

(Submitted April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon

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an order made January 26, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

Rufus Scott for appellant.

J. R. & M. B. Jewell for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

HOWARD S. JONES, Respondent, *v.* ROBERT L. MOORES et al.,
Appellants.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 20, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

George F. Alexander for appellants.

Salter S. Clark for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

LAURA E. OWENS, an Infant, by Guardian, etc., Respondent,
v. JOHN H. ERNST et al., Appellants.

(Argued April 16, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December 27, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Thomas S. Moore for appellants.

Isaac M. Kapper for respondent.

Agree to affirm ; no opinion.

All concur, except PECKHAM and GRAY, JJ., dissenting.

Judgment affirmed.

**MARTIN LYNCH, Respondent, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Appellant.**

(Argued April 17, 1894 ; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made January 3, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

James Fraser Gluck for appellant.

George W. Cothran for respondent.

Agree to affirm ; no opinion.

All concur, except EARL, J., not voting, and FINCH, J., not sitting.

Judgment affirmed.

**NELSON BEARDSLEY, Appellant, v. ARTHUR M. GAYLORD et
al., Respondents.**

(Argued April 17, 1894 ; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of defendants entered upon a verdict.

James R. Cox for appellant.

F. D. Wright, for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

ERASTUS F. ROOT, as Sole Overseer of the Poor, etc., Appellant, on the Relation of ARTHUR C. FISHER et al., Respondents, *v.* ALBERT J. ALEXANDER, Respondent.

(Argued April 17, 1894; decided May 1, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made March 29, 1893, which reversed an order of Special Term granting a motion to dismiss the complaint.

Charles H. Brown for appellant.

W. Martin Jones for respondent.

Agree to affirm on opinion below.

All concur, except EARL and O'BRIEN, JJ., not voting.

Order affirmed.

JOHN J. HOPPER, Appellant, *v.* EDWIN S. UPDIKE et al., Respondents.

(Argued April 23, 1894; decided May 1, 1894.)

MOTION for leave to discontinue appeal.

Carpenter & Hussett for motion.

Henry B. Weselman opposed.

Agree to grant motion on payment of costs in this court before argument; no opinion.

All concur.

Motion granted.

THE METROPOLITAN SAVINGS BANK, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

(Argued April 17, 1894; decided May 1, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

made December 16, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Reuben Leslie Maignard for appellants.

Augustus S. Hutchins for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

COCHRAN COTTON SEED OIL COMPANY, Respondent, v. THEODORE HAEBLER et al., Appellants.

(Argued April 18, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made January 3, 1893, which affirmed a judgment of the General Term of the City Court of New York, entered upon an order made October 24, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

Marshall P. Stafford for appellants.

Robert B. Honeyman for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ETOILE DE LORAZ, Respondent, v. FANNY DAVENPORT McDOWELL, Appellant.

(Argued April 13, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 17, 1893, which affirmed a judgment in

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favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

A. J. Dittenhoefer for appellant.

George M. Pinney for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JACKSON MONTGOMERY, as Sole Overseer of the Poor, etc.,
ex rel. SEYMOUR SEELY et al., Appellants, v. MARCELLUS E.
ODELL, Respondent.

(Argued April 19, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which affirmed a judgment in favor of defendant entered upon findings of the court on trial at Circuit.

W. Martin Jones for appellants.

S. D. Halliday for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THOMAS O'MALLEY, Respondent, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

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(Argued April 19, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

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Lewis E. Carr for appellant.

John M. Gardner for respondent.

Agree to affirm ; no opinion.

All concur, except EARL, J., not voting.

Judgment affirmed.

CHRISTOPHER LOCHMANN, Appellant, v. ELLEN MEEHAN,
Respondent.

(Argued April 20, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 27, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

Philip L. Wilson for appellant.

William E. C. Mayer for respondent.

Agree to affirm ; no opinion.

All concur, except BARTLETT, J., taking no part.

Judgment affirmed.

EUGENE STAUBSANDT, Respondent, v. WILLIAM F. LENNON,
Appellant.

(Argued April 20, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made March 6, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

James Kearney for appellant.

John C. Coleman for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

JOHN ENRIGHT, Appellant, v. THE MONTAUK FIRE INSURANCE
COMPANY of the City of Brooklyn, Respondent.

(Argued April 20, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 12, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Delos McCurdy for appellant.

H. C. M. Ingraham for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

E. STANTON RIKER, Respondent, v. TIMOTHY MAHONEY et al.,
Appellants.

(Submitted April 20, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Andrew A. Henderson for appellants.

Franklin Pierce for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

GUSTAVE HEYE, as Sole Surviving Executor, etc., Appellant,
v. HENRY M. TILFORD et al., as Executors, etc.,
Respondents.

(Argued April 23, 1894; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 9, 1894, which reversed an order of Special Term denying a motion for leave to amend the answer and granted such motion.

Edward B. Hill for appellant.

Peter B. Olney for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

In the Matter of the Estate of THEODORE SCHEIDELER,
Deceased.

(Argued April 23, 1894; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 12, 1894, which affirmed an order of the surrogate of the city and county of New York directing payment of a legacy under the will of Theodore Scheideler, deceased.

John Braden for appellant.

Henry Schmitt for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

JOSEPH M. WARREN et al., as Surviving Trustees, etc.,
Respondents, v. THE BIGELOW BLUE STONE COMPANY,
et al., Defendants.

In the Matter of the Application of HELEN M. KELLOGG, a
Stockholder, Appellant.

(Argued April 23, 1894; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which affirmed an order of Special Term denying an application by Helen M. Kellogg to intervene and be made a party defendant.

L. Laflin Kellogg for appellant.

Henry A. King for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

LOUIS BOURDON, Respondent, v. FRANCIS A. MARTIN, as
Receiver, etc., Appellant.

(Argued April 23, 1894; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which affirmed an order of the Special Term directing the defendant personally to pay the costs of this action.

J. W. Atkinson for appellant.

Thomas O'Connor for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE ex rel. FREDERICK E. BATES, Appellant, v.
ROBERT G. H. SPEED et al., Respondents.*

(Argued April 23, 1894 ; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 21, 1893, which reversed an order of the Special Term denying a motion for increased costs.

Frederick Collin for appellant.

A. J. Robertson for respondents.

Agree to affirm on opinion below.

All concur.

Order affirmed. _____

THE PEOPLE ex rel. JAMES C. FARGO, as President, etc.,
Respondent, v. SIMON W. ROSENDALE, Attorney-General,
Appellant.

(Argued April 23, 1894; decided May 4, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which reversed an order of Special Term denying an application for a writ of peremptory mandamus and granting mandamus.

T. E. Hancock, Attorney-General, for appellant.

Frank Hasbrouck for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

* Reported below, 73 Hun, 302.

NATHAN COHEN, Respondent, v. JOHN SIMMONS, Appellant.

(Argued April 24, 1894; decided May 4, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 20, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Edward W. S. Johnston for appellant.

Otto Horwitz for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JOHN O'BRIEN et al., Appellants, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.*

(Submitted April 9, 1894; decided June 5, 1894.)

MOTION for a re-argument.

The following is the opinion of the court in full:

"The appellants upon this motion for a re-argument have availed themselves of the opportunity to in fact re-argue their whole case. In their grounds for their application they have stated several reasons why such motion should be granted, but in truth they have failed to show that any reasons exist for a re-argument other than the claim that the court has plainly erred in its construction of the contract in question. We might, therefore, deny the motion on the ground that no reason recognized by the court has been shown for granting the same. (*Fosdick v. Town of Hempstead*, 126 N. Y. 651.) Appreciating however, as we do the extraordinary importance of the case to the parties, and understanding the strength of the plaintiffs' desire for one more hearing before this court, and also being sensibly alive to the

* Reported 139 N. Y. 543.

far-reaching results of our decision in its application to other possible suits, we have felt inclined to overlook the failure of the plaintiffs to bring their case within any one of the acknowledged grounds which the court recognizes as sufficient to grant an application of this kind, and we have, therefore, again examined the whole case with the care and deliberation which its importance demands. The appellants have submitted very voluminous briefs upon this application, which we have read with attention and care. The arguments contained in them, however, are nothing more than a reiteration and amplification of those which were addressed to us upon the original argument. It is impossible for us, notwithstanding this re-statement of the plaintiffs' case, to come to any different conclusion from that already announced by us.

"The whole question depends upon what is the true construction of the contract between the city and the plaintiffs and what is the true meaning of the legislative act under which the contract was entered into and the work performed. After full reflection we are still of the opinion that the line AAA. mentioned in the case is a line of limitation beyond and outside of which the measurement for excavation could not under the contract extend.

"The same reasoning which caused us to arrive at the conclusion that the defendant could not be held liable for the alleged faults in giving from time to time mistaken and incorrect lines and levels for excavation, still control us, and we remain of the opinion we have already expressed upon this branch of the case.

"Retaining the view that our decision as heretofore announced is correct, we are compelled to deny the motion for a re-argument, with ten dollars costs."

Charles F. Tabor, E. T. Lovatt and L. Laflin Kellogg for motion.

James C. Carter, Elihu Root and Austen G. Fox opposed.

Per Curiam opinion for denial of motion.

All concur, except O'BRIEN, J., not voting; EARL, J., concurring in result.

Motion denied.

CHARLES BANKS, Appellant, v. THE NEW YORK CLUB,
Respondent.*

(Argued April 24, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of March, 1893, which overruled plaintiff's exceptions and directed judgment in favor of defendant upon a verdict directed by the court.

John C. Coleman for appellant.

Ira D. Warren for respondent.

Agree to affirm on opinion below.

All concur, except PECKHAM and GRAY, JJ., not voting.

Judgment affirmed.

JAMES M. HAZELWOOD, Appellant, v. DANIEL STARING et al.,
Respondents.

(Submitted April 24, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Thompson & Chapman for appellant.

Elon R. Brown for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 68 Hun, 92.

FRANCIS A. DIKE, Respondent, *v.* WILLIAM LONG, as Survivor, etc., Appellant.

(Argued April 25, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order which reversed a judgment in favor of defendant entered upon the report of a referee.

J. B. & G. B. Adams for appellant.

Abbott & Abbott for respondent.

Agree to reverse judgment of General Term and to affirm that entered on report of referee; no opinion.

All concur.

Judgment accordingly.

JOHN W. BOUGHTON et al., Respondents, *v.* MILLARD F. SMITH, Appellant.

(Argued April 25, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 4, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

This action was brought to recover a balance claimed to be due upon a contract under which plaintiffs had laid certain floors in the house of defendant.

The following is the opinion in full:

"There was no dispute on the trial of the evidence given by the defendant as to the contract. The plaintiffs contracted to put parquet floorings throughout the house of the defendant, and the work was to be 'first class.' Nor was there any substantial difference in the testimony as to what constituted a first-class flooring of this description. The beauty of the flooring depends upon the blocks being so laid as to leave no spaces between them, and with materials so

seasoned and prepared that, after the blocks are laid, spaces will not open by shrinkage. This is what the floor maker, as one of the plaintiffs testified, undertakes to do, 'that the blocks shall be so seasoned, and so well and carefully laid, that there shall be no space whatever between the blocks.' It appears, however, that it is unavoidable that there may here and there be a block which will shrink somewhat, a defect which, on going over the floor again, may be easily remedied without destroying the body of the work. The contract for the laying of the floors was made in 1887, and the work was to be completed that season. The floors were laid in the fall of that year, and, when first completed, they were smooth and even, without breaks. But soon afterwards spaces began to open between the blocks. The defendant made complaint, and the plaintiffs took up part of the floors the next year and re-laid them. But the blocks soon separated again. In 1889 the plaintiffs took up and re-laid the part of the floors not taken up the year before, and filled in the spaces in the work of the previous year, so that the job, when completed, seemed perfect, and the defendant expressed himself satisfied with their appearance at that time. This was in August. The plaintiffs then applied for the payment of the contract price. The defendant paid \$700 on the contract, but declined to pay the balance of \$650 until he could see 'how the floors stand.' To this the plaintiffs consented. Soon after the shrinkage commenced again and the blocks in nearly every room in the house commenced to separate. In Dec., 1889, the plaintiffs, as their evidence tends to show, sent a workman to the house to repair the floors and fill the spaces, who was there engaged in this work for three days. The workman testified that when he got through the floors were smooth and solid, and that the defendant expressed his satisfaction. The defendant testified that no work was done on the place after August. But the evidence given by experts and others is uncontradicted, that after Dec., 1889, the floors throughout the house were in very bad condition, with the exception of floors in one or two rooms. The blocks did not join and the floors were generally very imperfect and have so remained. The plaintiffs testified that shrinkage of the blocks

may have been caused by excessive heat in the house, or by dampness. But the affirmative evidence shows that these conditions did not exist, and that the shrinkage could not be attributed to either of these causes. It was also shown that the material for the floors was brought from Philadelphia and taken to the house in open wagons, and on one or more occasions were exposed to the rain on the way. We fail to find in the record any evidence that the plaintiffs substantially performed their contract, and we think the motion for nonsuit on that ground should have been granted. The plaintiffs gave evidence that the floors were of the best materials and workmanship. This does not meet the specific and uncontradicted evidence as to shrinkage, and the acts of the plaintiffs in re-laying and repairing them show that the general statements were not intended to cover this defect.

"The judgment should be reversed and new trial granted."

H. D. Birdsall for appellant.

W. P. Knapp for respondents.

ANDREWS, Ch. J., reads for reversal and new trial.

All concur.

Judgment reversed. _____

WILLIAM E. DEVLIN, Respondent, *v.* LOUIS O. KOSEL,
Appellant.

(Submitted April 25, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 27, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

William J. Courtney for appellant.

William B. Hurd, Jr., for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

JOHN N. MOORE, Respondent, *v.* **LAURA M. NYE**, Appellant.

(Argued April 25, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 22, 1892, which reversed a judgment in favor of defendant entered upon an order setting aside an injunction and dismissing the complaint on trial at Circuit.

R. Corbin for appellant.

L. L. Shedden for respondent.

Agree to affirm order and for judgment absolute in favor of defendant on stipulation; no opinion.

All concur.

Order affirmed and judgment accordingly.

T. ELLA CARPENTER, Respondent, *v.* **EDGAR KNAPP**, Appellant.

(Argued April 26, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

W. Farrington for appellant.

Fred E. Ackerman for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM G. BATES et al., Respondents, *v.* **UNITED LIFE INSURANCE ASSOCIATION**, Appellant.

(Argued April 26, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon

an order made March 20, 1893, which affirmed a judgment in favor of plaintiffs entered upon an order of Special Term which granted a motion for judgment upon the pleadings.

Harry Wilber and *Matthew Hale* for appellant.

Wm. Ives Washburn for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

FREDERICK MARX et al., Respondents, v. EUGENE A. GROSS
et al., Appellants.

(Argued April 26, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 6, 1893, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

George M. Thomson and *Austen G. Fox* for appellants.

George A. Black for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

CATHARINE TOUMEY, Respondent, v. O'REILLY, SKELLY &
FOGARTY COMPANY, Impleaded, etc., Appellant.

(Argued April 27, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 4, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Edward W. S. Johnston for appellant.

Horace Clark Skelly for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

**THE McELWEE MANUFACTURING COMPANY, Respondent, v.
BENJAMIN A. TROWBRIDGE, Appellant.**

(Submitted April 27, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the March term, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

George S. Coleman for respondent.

Judgment affirmed by default; no opinion.

All concur.

Judgment affirmed. _____

**JOSHUA C. SANDERS, Respondent, v. JAMES L. PARSHALL,
Appellant.**

(Argued April 27, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 21, 1893, which reversed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term and which granted a new trial.

Jacob Fromme for appellant.

Joshua C. Sanders, respondent, in person.

Agree to affirm; no opinion.

All concur.

Order affirmed.

JACOB C. SCHUYLER, Respondent, *v.* HAMILTON BUSBEY et al.,
Appellants.*

(Argued April 27, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

H. M. Whitehead for appellants.

Grant Squires for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

EMANUEL POPPER, Appellant, *v.* HENRY WALLACH et al.,
Respondents.

(Argued April 30, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the February term, 1893, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Circuit.

Edward W. S. Johnston for appellant.

Leopold Wallach for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 68 Hun, 474.

AARON HEALY et al., Appellants, v. ISAAC BRANDON et al.,
Respondents.

(Argued April 30, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 16, 1892, which overruled plaintiff's exceptions and directed judgment in favor of defendants upon order dismissing the complaint on trial at Circuit.

Thomas G. Shearman for appellants.

James L. Bennett for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM T. G. WEYMOUTH, Respondent, v. THE BROADWAY
AND SEVENTH AVENUE RAILROAD COMPANY, Appellant.

142b	681
147	380

(Argued April 30, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 6, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Thomas S. Moore for appellant.

Thomas P. Wickes for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

AUGUSTUS N. LINDSLEY, Appellant, v. HENRY W. VAN CORT-
LANDT et al., Respondents.

(Argued April 30, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 13, 1893, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and also reversed an order of Special Term permitting plaintiff to serve a supplemental complaint.

James M. Hunt for appellant.

William W. Schrugham and *John H. Ferguson* for respondents.

Agree to affirm and for judgment absolute in favor of defendants on stipulation; no opinion.

All concur.

Order affirmed and judgment accordingly.

143b 682
143 675

WILLIAM S. WILLIAMS, Appellant, v. ROBERT LINDBLOM,
Impleaded, etc., Respondent.*

(Argued May 1, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of February, 1893, which reversed a judgment in favor of plaintiff entered upon a report of a referee, vacated an order of reference and granted a new trial before another referee.

D. M. Porter for appellant.

L. A. Gould for respondent.

Agree to affirm and for judgment absolute in favor of defendant on opinion of FOLLETT, J., below.

All concur.

Order affirmed and judgment accordingly.

* Reported below, 68 Hun, 173.

SKENANDOA COTTON COMPANY, Respondent, v. MARY E. LEFFERTS, Impleaded, etc., Appellant.

(Submitted May 3, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Doyle & Fitts for appellant.

Nicholas E. Kernan for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

CATHARINE MITTNACHT, Appellant, v. JAMES J. SLEVIN, Respondent.*

(Submitted May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of February, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

Ernest G. Stedman and *John Larkin* for appellant.

B. B. Kenyon for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 67 Hun, 815.

684 MEMORANDA OF CAUSES NOT REPORTED.

LUTHER L. DEAN et al., Appellants, v. WILLIAM J. BENN
et al., Respondents.*

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1893, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Special Term.

Matthew Hale for appellants.

Edward P. White for respondents.

Agree to affirm on opinion of Special Term.

All concur, except GRAY, J., not voting.

Judgment affirmed.

ADOLPHUS E. KINNEAR, Appellant, v. ROBERT S. POWELL
et al., Respondents.

(Argued May 4, 1894; decided June 5, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 1, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

George A. Black for appellant.

George Bethune Adams for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 69 Hun, 519.

INDEX.

ACCOUNTING.

1. A right of action in favor of a retiring against the liquidating partner for an accounting does not accrue at the time of the dissolution; nor is it postponed until the last item of partnership business is settled and closed. The liquidator is bound to be diligent, and where there has been a needless delay equity may interfere. *Gilmore v. Ham.* 1
2. The right of action, therefore, accrues, and the Statute of Limitations begins to run against it when, under the circumstances of the particular case, the liquidating partner has had a reasonable time within which to perform his duty, and so is in fault for not fully completing it. *Id.*
3. In an action for an accounting and contribution between co-partners, brought in 1890, it appeared that in 1889 plaintiff abandoned the partnership and left the state. Defendant shortly after published a notice of the dissolution of the firm, and that he would close its affairs. In 1871 defendant sold out and received his pay for the partnership stock of goods then in his possession; he paid the firm debts, except one note, and he had ample assets in his hands to pay that. An action was brought upon this note in 1886; plaintiff alone defended; as the Statute of Limitations did not protect him because of his continued absence from the state, judgment was rendered against him and he was compelled to pay the full amount of the note and accrued interest. *Held*, that judgment was properly rendered against defendant, in accordance with the prayer of the complaint, for contribution of one-half the amount so paid by plaintiff; but that the cause of
- action for an accounting was barred by the statute; that the case was to be considered as if the partnership had been dissolved by mutual consent and defendant appointed the liquidating partner, and when in 1871 he turned the firm assets into money his duty required payment by him of all the firm debts, and the cause of action for an accounting then accrued and the statute began to run. *Id.*
4. While a court of equity may have jurisdiction of an action, brought by a principal against his agent, for an accounting as to property intrusted to defendant as agent, this does not make the action necessarily referable. *Empire State T. & T. Co. v. Bickford.* 224
5. The complaint herein asked that defendant account as to his transactions as agent for plaintiff in respect to these items: (1) Receipts and disbursements of plaintiff's moneys; (2) the conversion of personal property belonging to plaintiff and intrusted to defendant; (3) revenue lost to plaintiff by reason of defendant's neglect of his duties and his attempt to establish a competing business; (4) the proportion of the cost of equipment by plaintiff of a new place of business rendered necessary by defendant's wrongful acts and omissions. An order of reference was granted on motion of plaintiff. *Held*, error; that the first item was the proper subject of an accounting; that while the second might also be, it was not necessarily referable; that the other two items were not matters of account or of equitable cognizance; that the action should be treated as a whole, and so considered was an action at law and not one in equity. *Id.*
6. *It seems*, after the issues at law have been tried, if an accounting

as to receipts and disbursements becomes necessary a reference may be ordered to take it. *Id.*

7. The provisions of the Code of Civil Procedure (§ 2606) in reference to an accounting by an executor, or administrator of a deceased executor, administrator or testamentary trustee, as to the trust property, do not apply to a special guardian appointed in proceedings for the sale of the real estate of infants. *Long v. Long.* 545

8. The surrogate has no jurisdiction of proceedings to require such a special guardian to account, but the power lies in the court from which he derived his appointment. *Id.*

9. While it may be, as a general rule, that a surety upon the official bond of a special guardian, appointed to sell the real estate of an infant, is not liable until the remedies against his principal are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends, the infant will not be compelled to resort to it before bringing suit upon the bond. *Id.*

10. Where, in an action for an accounting, the defendants proved a full settlement in regard to the whole transaction, *held*, that the court was not bound to retain the case as against one of the defendants, to enable plaintiff to recover upon a cause of action against him growing out of the settlement, and that the complaint was properly dismissed. *Sherburne v. Taft.* 619

ACTION.

— *When action for an accounting one of law not equity.*

See E. S. T. & T. Co. v. Bickford. 224

See CAUSE OF ACTION.
CRIMINAL ACTIONS.

ACTS OF CONGRESS.

1. The provisions of the National Banking Law (§ 5242), prohibiting

transfers or payments by a National bank after the commission of an act of insolvency, or in contemplation thereof, made "with a view to the preference of one creditor to another," was not intended to and does not require that in the distribution of the assets of an insolvent National bank, rights lawfully acquired by a creditor, or superior equities, should be disregarded and annulled, and so, liens, equities or rights arising by express agreement between the bank and one contracting with it, or implied from the nature of the dealings between the parties, or by operation of law prior to insolvency, and not in contemplation thereof, are not invalidated. *Elmira Stgs. Bank v. Davis.* 590

2. It is the voluntary act of the bank in view of insolvency, and with the view of preventing the ratable application of its property which is declared to be null and void. *Id.*

ADMISSIONS AND DECLARATIONS.

In an action of ejectment plaintiff claimed title under a deed from W. Defendants were in possession claiming as heirs at law of W.; the latter continued in possession after the conveyance to plaintiff. Defendants offered to prove on the trial the declarations of W., made to third persons after his conveyance to plaintiff and when he was in possession, to the effect that his intent was not to make an absolute conveyance to plaintiff, but he had divested himself of title to avoid threatening embarrassments of litigation. *Held*, that such declarations were inadmissible, and so were properly rejected. *Williams v. Williams.* 158

AMENDMENT.

By an interlocutory judgment in an action for partition, which directed a sale of the premises, it was provided that the life estate of defendant M., a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of the sale "a gross sum in

satisfaction of said tenancy by the curtesy, to be fixed * * * according to the principles of law applicable to annuities." After entry of said judgment and before a sale M. died. Thereafter, upon motion, the judgment was amended by striking out the provision in reference to said life estate. *Held*, no error; that the death of the life tenant terminated his interest; this rendered the execution of that part of the judgment directing a sale of that interest impossible, and the proceeds of sale could not equitably be charged with the supposed value of the life which had terminated; and that until a sale the proceedings were incomplete and the right of the life tenant to a share of the proceeds was conditional, not fixed and absolute. *Mingay v. Lackey.* 449

AMSTERDAM (CITY OF).

1. Under the charter of the city of Amsterdam (§ 95, chap. 131, Laws of 1885), before the grade of a street which has once been established can be changed, there must be a "petition of the owners of a majority of the lineal feet fronting on the part of the street to be graded," and compensation must also be made to the owners of the property injured by the re-grading. *Holmes v. City of Amsterdam.* 118
2. To establish the grade of a street within the meaning of said charter, it is not essential that there should be a formal ordinance; it may be established by long user and by the acquiescence and recognition of the municipality. *Id.*
3. In an action brought by plaintiff to recover damages to his lots bounded on S. street in said city, caused by changing its grade, and also to vacate an assessment upon said lots for sidewalks constructed in front thereof on said street and K. street, these facts appeared: S. street had been used as a public street for more than forty years; it was graded and improved by the municipality and houses were built compactly on both sides,

conforming to the grade of the street as it then existed. Sidewalks had been built under direction of the municipal authorities upon grades given by them. Defendant's common council passed a resolution establishing a new grade for S. street. There was no petition of owners requesting the change. To conform to the change of grade, S. street was excavated in front of plaintiff's premises and a new sidewalk laid. *Held*, that plaintiff was entitled to recover his damages; and that the assessment for laying the sidewalk was void. *Id.*

4. Also *held*, that the assessment was void, as it included the expense of a sidewalk on K. street, which the common council had not by ordinance ordered to be constructed, and which plaintiff had not by any notice been required to construct as required by the charter. *Id.*

APPEAL.

1. A judgment should not be reversed upon an exception to a remark of the trial judge, which, although erroneous standing by itself, was so coupled with other statements as to modify it and give the correct rule. *Randall v. Packard.* 47
2. In an action by an attorney to recover compensation for professional services, the court charged in substance that in estimating the value of plaintiff's services, "several circumstances must enter into the computation, *i. e.*, the professional reputation of plaintiff for ability and integrity, the difficulty and importance of the case, the amount of work and labor performed, the amount involved, the pecuniary ability of the client," and after a general discussion of these considerations stated, "the main element after all in determining the value of the lawyer's services is the result," adding, "a charge must be adjusted to the benefit, in a measure at all events. * * * Undoubtedly a lawyer * * * will not charge as much if his client be unsuccessful. * * * You must look to

the benefit." *Held*, that the charge, taken as a whole, simply conveyed the idea that while the result was an important element to be considered, it was only one of the several elements specified, and so there was no error. *Id.*

3. A motion for a new trial was made after judgment for plaintiff, on the ground that he had sworn falsely upon his cross-examination on the trial, in denying he had been disbarred as an attorney. *Held*, that as from the proofs presented on the motion it was a debatable question, admitting of opposing inferences as to whether plaintiff had been actually disbarred, in the legal sense of that word, it could not be said, as matter of law, that he had sworn falsely, and that the decision of the court below denying the motion was not reviewable here. *Id.*

4. Where an appeal is based simply upon an exception to a denial of a motion, made at the close of all the evidence on trial, for a direction of a verdict in favor of the appellant, it cannot be sustained unless it appears not only that there were no controverted questions of fact, simply questions of law for the court, but also that the jury did not correctly determine those questions. *Ming v. Corbin.* 334

5. If a question of law has been erroneously submitted to the jury, and decided as it should have been by the court, no one is prejudiced by the error, and so, there is no ground for appeal. *Id.*

6. While, where a decision of the board of police commissioners of the city of New York removing a patrolman from the police force has been affirmed by the General Term, this court cannot interfere if there was any evidence fairly sustaining the decision, it may review and reverse it where there is no real conflict in the evidence and there is a substantial failure of evidence to sustain the decision. *People ex rel. v. Martin.* 352

7. The Supreme Court has no power on appeal to add to a judgment a

sum which it finds by the evidence to be due plaintiff, where the question as to what amount is due is one of fact, upon which either party might demand the verdict of a jury. *Dayton v. Parke.* 391

— *An appeal to this court from order reversing on the facts a judgment of conviction in a criminal action may not be entertained.*

See People v. Mitchell (Mem.). 639

— *Upon reversal of a judgment here, a second trial was had and judgment rendered in accordance with decision on reversal. Upon a second appeal this court considered simply whether substantially the same evidence was presented, and so holding, affirmed.*

See White v. Wood (Mem.). 656

APPEARANCE.

The service of a general notice of retainer and a general appearance in an action by an attorney for a non-resident defendant is equivalent to personal service of the summons and gives the court jurisdiction of the person of such defendant. *Reed v. Chilson.* 152

APPORTIONMENT (OF ASSEMBLY DISTRICTS).

1. The board of supervisors of a county entitled to more than one member of assembly, in making an apportionment of assembly districts, are entitled to the exercise of a reasonable discretion. *In re Baird.* 523

2. As under the constitutional limitations forbidding the division of towns in making such an apportionment and requiring each district to be of convenient and contiguous territory, absolute equality of population in the districts is not possible, a slight variation will not warrant or justify an application to the courts for redress. To authorize this there must be a grave, palpable and unreasonable deviation, so that when the facts are presented, argument will not be necessary to show that such a deviation has been intentionally made. *Id.*

3. The constitutional prohibition against the division of towns in making the apportionment does not apply to wards of a city. A ward, although treated as a town for some purposes of municipal government, is not a town within the meaning of said prohibition, and so, a ward may be divided.

Id.

4. A writ of mandamus having been granted setting aside an apportionment made by the board of supervisors of the county of Kings, and directing a new apportionment, said board re-convened and made such apportionment. On application for an alias writ, it appeared that if the county was so divided that each district would contain the same number of inhabitants, each of the eighteen districts the county was entitled to would contain 54,877 people. Eleven of the districts, as apportioned, contained a population ranging from 53,000 to 58,000; the others contained the following population respectively: 61,263, 60,808, 60,381, 58,550, 50,393, 49,197, 48,944. *Held*, that the deviations were not so great as to justify the interference of the courts; that the apportionment did not, upon the face of the record, indicate such a manifest abuse of discretion as to amount to an evasion or disobedience of the former decision. *Id.*

5. The Constitution does not require the districts to be made up of compact territory, and the fact that districts in a city are irregular in form does not establish any actual inconvenience. *Id.*

6. The fact that in making an apportionment of a county into assembly districts it was not based upon the citizen population, but aliens were included, does not necessarily require that the apportionment should be set aside for that error. The court will not presume a material disproportion in the distribution of aliens throughout the county. *In re Whitney*. 531

7. In proceedings by mandamus to compel the board of supervisors of Kings county to re-convene

and make a new apportionment of the county into assembly districts on the ground that the apportionment made was not based on the citizen population, excluding aliens, but that aliens were included, it appeared that the apportionment first made was set aside in proceedings by mandamus as violative of the Constitution, unequal and vicious, and a new apportionment ordered. In making the original apportionment the same error was made, *i. e.*, including aliens, but no objection was taken on that account in the first proceedings. Another apportionment (the one here complained of) was then made. The proof tended to show that the distribution of aliens through the districts formed was in a proportion varying so little from that of the citizen population that the same apportionment might properly have been made had it been based upon the citizen population alone. *Held*, that under the circumstances and as no appreciable harm had resulted from the error complained of, a second judicial interference was not required. *Id.*

ASSEMBLY.

See LEGISLATURE.

ASSESSMENT AND TAXATION.

1. In an action brought by plaintiff to recover damages to his lots bounded on S. street in the city of Amsterdam, caused by changing its grade, and also to vacate an assessment upon said lots for sidewalks constructed in front thereof on said street and K. street, these facts appeared: S. street had been used as a public street for more than forty years; it was graded and improved by the municipality and houses were built compactly on both sides, conforming to the grade of the street as it then existed. Sidewalks had been built under direction of the municipal authorities upon grades given by them. Defendant's common council passed a resolution establishing a new grade for S. street. There was no petition of owners request-

- ing the change as required by the city charter (§ 95, chap. 131, Laws of 1885). To conform to the change of grade, S. street was excavated in front of plaintiff's premises and a new sidewalk laid. *Held*, that plaintiff was entitled to recover his damages; and that the assessment for laying the sidewalk was void. *Folmsbee v. City of Amsterdam*. 118
2. Also *held*, that the assessment was void, as it included the expense of a sidewalk on K. street, which the common council had not by ordinance ordered to be constructed, and which plaintiff had not by any notice been required to construct as required by the charter. *Id*.
3. The will of C. created trusts for the benefit of her two daughters and two grandchildren named, each trust for the life of the beneficiary. The remainders were given one-half to such of her nephews, and one-half to such of her nieces named as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue, to such issue. *Held*, that the remainders were not liable to taxation under the Collateral Inheritance Tax Act of 1885 (Chap. 483, Laws of 1885) until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable, or to others in whose possession it would be exempt, as in case of the death of the nephews or of the nieces named prior to the expiration of the trust the one-half of the remainder would go to the heirs at law of the testatrix; also, that conceding there was upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate. *In re Curtis*. 219
4. The intent of said law was to subject only real and beneficial interests to taxation, and when it is only in the chance of uncertain future events that such an interest will alight where it will be taxable at all, a delay until the contingency is solved is necessary and proper. *Id*.
5. Where, the board of supervisors of Westchester county, on petition of the trustees of the village of Peekskill, organized under a special charter (Chap. 117, Laws of 1883), passed an act extending its boundaries, and the village assessors included in their assessment roll the lands so attempted to be brought within the corporate limits, *held*, that said assessments were illegal and were properly stricken from the roll. *People ex rel v. Mabie*. 343
6. The legislature may release property which has been assessed for taxation, and this power may be exercised in any way and at any time during and before the completion of the proceedings for taxation. *People ex rel. v. Comrs. Taxes, etc.* 348
7. Under the act of 1893 (Chap. 498, Laws of 1893), exempting from taxation so much of the real estate of certain religious corporations as is used exclusively for its corporate purposes, which act, by its terms, declares that it "shall take effect immediately," a corporation included in the act is exempt from a tax upon its real estate so used for the year 1893, where the assessment had not been completed, and so placed beyond the power of the taxing officers to change, prior to the time when the act became a law. *Id*.
8. Said act became a law on April 29, 1893. All of the real estate of the relator, a religious corporation in the city of New York, was assessed for that year. *Held*, that, as by the New York Consolidation Act (Chap. 410, Laws of 1882), the books containing the "annual record of the assessed valuation of real and personal estate" remain open until the first day of May, and up to that time the commissioners of assessment and taxation have power to correct them in respect to valuations, the real estate used exclusively by the corporation for its own purposes was exempted from tax-

ation; that the commissioners were authorized and required to remove the entry thereof from the books; and that a mandamus requiring the commissioners to remit the tax assessed thereon was properly granted. *Id.*

9. Defendant, a club incorporated under the act of 1875 (Chap. 267, Laws of 1875), as amended, and owning a parcel of land for its corporate purposes, sold and conveyed a lot to plaintiff. By the terms of the deed the purchaser became a member of the club and held subject to its rules and regulations. These provided for assessments to be made for purposes specified and for a forfeiture of title in case a member failed to pay an assessment as prescribed. An assessment was made by the board of managers, and upon plaintiff's refusal to pay he was served with a notice that his title and membership would be forfeited, unless at a date specified he appeared before the board and showed cause to the contrary. Plaintiff thereupon brought this action to have the action of the board rescinded, as a cloud on his title, and to restrain the forfeiture. The assessment on its face showed it was made in part for permanent improvements. Plaintiff claimed that no assessments could be made for such purposes. *Held*, that conceding this claim to be correct there was no cloud on title, as the illegality appeared upon the face of the papers, and the facts the association would be compelled to prove to enforce at law the assessment or forfeiture would themselves show the invalidity. *Whiteside v. N. C. Assn.* 585

10. By the terms of the plaintiff's deed he was granted "the use of the club house, public grounds, water front," etc. By the by-laws two funds were constituted, one to be "applied exclusively to the purchase, improvement and maintenance of the grounds and other property of the association." The other, into which all assessments were to be paid, was to be appropriated "in the first instance" to current expenses, but it was provided that any surplus at the end

of the year should be turned over to the other fund. It was also provided that the board of managers might "from time to time make assessments for other purposes * * * as they shall deem necessary." *Held*, that taking and construing the deed and by-laws together the assessment was valid and enforceable, as prescribed by the by-laws. *Id.*

ASSIGNMENT.

1. An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee. *Rapps v. Gottlieb.* 164
2. Where, therefore, a bond and mortgage was executed and delivered to G. upon the express understanding that he should advance thereon a sum specified, and that until the advance was made they were to be "invalid, void and no effect," and G. made no advance, but assigned the instruments to S., who took in good faith and for value, *held*, that the mortgage was invalid in the hands of the assignee; and that an action was maintainable to have the same canceled as a cloud on plaintiff's title. *Id.*
3. The distinction pointed out between such a case and one relating to the transfer of conceded existing legal rights, wherein questions arise as to equities, not between the original parties, but between subsequent holders; as in the cases of *McNeil v. Tenth Nat. Bank* (46 N. Y. 325); *Moore v. Met. Bank* (55 id. 41). *Id.*
4. The rule that where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done, applies only in an emergency; it is a rule of last resort, applicable only where all others fail. *Id.*
5. B. died, leaving a widow and two children, a son and a daughter, him surviving. By his will he

directed his residuary estate to be divided into three parts. He gave the rents, issues and profits of one part to his wife, of one to his daughter during life, and of the other part to the son until he should reach the age of thirty years, when one-half of said part was given to him absolutely, the other half when he attained the age of forty. In case of the death of the son before his third became vested in him, either in part or wholly, the portion that had not vested was given to his children, if any survived him. The will directed that at the death of the widow the part appropriated to the use of the widow should be divided and one-half thereof added to the daughter's part, the other half to that of the son, each "to be governed and affected in every respect" by the provisions of the will touching the parts of the children respectively "as fully and particularly as if such additions had originally constituted portions of said parts." The son died after reaching the age of forty, leaving children. Thereafter the widow died. In an action for the construction of the will, *held*, it was the clear intention of the testator that the son should become vested with one-half of all he was to take under the will at the age of thirty, and with the other half at forty, subject, however, to the life estate of the widow in the one-third set apart for his mother, and so that an assignment by the son of his interest carried with it one-half of that third. *Dimmick v. Patterson*. 322

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. A preference exceeding in amount one-third of the assets of an insolvent, made by a transfer of property to a *bona fide* creditor just prior to the execution of an assignment for the benefit of creditors, does not under the General Assignment Act (Chap. 503, Laws of 1887), in the absence of any intent to hinder, delay or defraud creditors, vitiate the transfer or assignment. *Abegg v. Bishop*. 286
2. In case the transfer and the assignment are to be taken together as one transaction, the restraint of the statute does not stamp the greater preference as fraudulent, but simply limits its effective operation to the permissible one-third. *Id.*
3. An action, therefore, is not maintainable to set aside the transfer or assignment because of the unlawful preference. *Id.*
4. *It seems* the only remedy is an action, in aid of the assignment and for the benefit of all the creditors, to subject the excess to the claims of creditors under that instrument. *Id.*

ATTACHMENT.

1. Upon motion to set aside an attachment granted, on the ground that defendant was a non-resident, it appeared that plaintiffs brought the action, as assignees of the claim set forth in the complaint; that their assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, and before the motion costs were paid this action was brought. *Held*, that while plaintiffs' assignors were stayed (Code Civ. Pro. § 779), the stay did not render the present action and the proceedings thereon void, and did not deprive the court of jurisdiction, but only rendered further proceedings irregular; and so did not affect the validity of the attachment; and that it was competent for the court below to deny the motion, in case plaintiffs paid the costs of the former action within twenty days. *Wessels v. Boettcher*. 212
2. While it is not necessary to the validity of an attachment that the affiant, upon whose affidavit the writ is applied for, should have personal knowledge of the facts required to be stated, and the same may be stated on information and belief, it is essential that his information should appear to have been competently derived. The sources of the information must be disclosed in such a way as to enable the court to decide

upon the probable truth of the statements and the authenticity of the jurisdictional facts. *Murphy v. Jack.* 215

3. An attachment was granted upon an affidavit of plaintiff's attorney; the averments therein were stated to be upon information and belief, the information and grounds of belief being statements of plaintiff, who was in Boston, and his counsel residing there, who (as the affidavit stated) "have both talked to deponent this morning over the telephone from Boston." It was not stated and did not appear that the affiant was acquainted with plaintiff and recognized his voice, or in any other way knew it was the plaintiff who was talking to him. *Held*, that the affidavit was insufficient; that while the necessary information may be communicated by telephone it must appear that the affiant knew the person so communicating with him and recognized the voice, or in some way such person must be identified. *Id.*

ATTORNEY AND CLIENT.

1. The result of a lawyer's services is a proper and an important element to be taken into consideration in determining their value. *Randall v. Packard.* 47
2. In an action by an attorney to recover compensation for professional services, the court charged in substance that in estimating the value of plaintiff's services, "several circumstances must enter into the computation, *i. e.*, the professional reputation of plaintiff for ability and integrity, the difficulty and importance of the case, the amount of work and labor performed, the amount involved, the pecuniary ability of the client," and after a general discussion of these considerations stated, "the main element after all in determining the value of the lawyer's services is the result," adding, "a charge must be adjusted to the benefit, in a measure at all events. * * * Undoubtedly a lawyer * * * will not charge as much if his client be unsuccessful.

* * * You must look to the benefit." *Held*, that the charge, taken as a whole, simply conveyed the idea that while the result was an important element to be considered, it was only one of the several elements specified, and so there was no error. *Id.*

8. A motion for a new trial was made after judgment for plaintiff, on the ground that he had sworn falsely upon his cross-examination on the trial, in denying he had been disbarred as an attorney. *Held*, that as from the proofs presented on the motion it was a debatable question, admitting of opposing inferences as to whether plaintiff had been actually disbarred, in the legal sense of that word, it could not be said, as matter of law, that he had sworn falsely, and that the decision of the court below denying the motion was not reviewable here. *Id.*

AWARD.

1. An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track of the road, does not deprive the owner of his right to compel the railroad company to construct suitable crossings. It is to be assumed that both parties stood upon their legal rights as to crossings, and they are in no manner extinguished or affected by the award. *Beardsley v. Lehigh Valley R. R. Co.* 173
2. Accordingly *held*, that an award in such proceedings, in the absence of evidence showing that the damages awarded rested to any extent upon the form or manner of constructing the crossings, was no defense to an action brought to compel defendant to construct an underground crossing. *Id.*
3. When land is acquired by the city of New York for street purposes, all pre-existing titles and interests become extinguished, the award of the commissioners of estimate and assessment standing as a substitute for the land taken, and when the lands taken are mortgaged, the mortgagee is en-

titled to have the award applied upon his mortgage to the extent necessary for his protection. *Gates v. De La Mare.* 807

4. In June, 1888, commissioners of estimate and assessment were appointed to acquire title to lands in the city of New York for a street that was laid out through the lands of D., which were then covered by a mortgage. In November, 1888, D. entered into an agreement with defendant, an attorney, authorizing the latter to take proceedings to have any award made to D. for the land taken for the street increased, and agreeing to pay him for his services one-fourth of any increase. In February, 1890, the commissioners made their preliminary report making an award for the land taken. Defendant thereupon appeared before the commissioners, and, by his efforts, the award was increased \$3,484. The final report of the commissioners was confirmed May 1, 1891. After the date of the first report, but before its confirmation, an action was commenced to foreclose the mortgage; the city was not made a party. In March, 1891, judgment of foreclosure and sale was entered; in April the whole of the mortgaged premises were sold pursuant to the judgment, and a deed was executed to the purchaser May 25, 1891. In an action to determine who was entitled to the award, upon which defendant claimed a lien under said agreement, *held*, that the mortgage was the paramount lien; that the mortgagee, not having been a party to the agreement with defendant, was not bound thereby; that as the sale was before the confirmation of the commissioners' report, and so before the city acquired title (§ 900, chap. 410, Laws of 1882), the purchaser by his deed took title to all the mortgaged premises, and as when the city acquired title the award stood as a substitute for so much of the land purchased as was taken by the city, the purchaser's deed operated to carry the award, and although this was increased by defendant's services, the purchaser was entitled to the whole thereof. *Id.*

BANKS AND BANKING.

1. The provisions of the National Banking Law (§ 5242), prohibiting transfers or payments by a National bank after the commission of an act of insolvency, or in contemplation thereof, made "with a view to the preference of one creditor to another," was not intended to and does not require that in the distribution of the assets of an insolvent National bank, rights lawfully acquired by a creditor, or superior equities, should be disregarded and annulled, and so, liens, equities or rights arising by express agreement between the bank and one contracting with it, or implied from the nature of the dealings between the parties, or by operation of law prior to insolvency, and not in contemplation thereof, are not invalidated. *E. S. Bank v. Davis.* 590
2. It is the voluntary act of the bank in view of insolvency, and with the view of preventing the ratable application of its property which is declared to be null and void. *Id.*
3. Accordingly *held*, that the provisions of the State Banking Law (§§ 118, 130, chap. 689, Laws of 1892), permitting savings banks to keep a fund on deposit in State or National banks, and providing that in case the bank receiving the deposit becomes insolvent, the savings bank shall have a preference, is not in conflict with the National law; and that a savings bank having deposits with a National bank when the latter became insolvent, was entitled to a preference in payment out of the assets of the insolvent bank in the hands of a receiver, after its circulating notes had been provided for and all the conditions of the National law had been complied with. *Id.*

BILL OF LADING.

- M. & Co. chartered plaintiff's schooner for a voyage from Charleston to New York. The charter party contained specific provisions for the payment of freight at a rate specified, and for

the payment of a sum specified for each day's unlawful detention. The cargo was consigned to defendants, who were the owners thereof. The bill of lading provided for the delivery of the cargo to the consignees, "they paying freight * * * as per said charter party and its conditions." Nothing was contained therein upon the subject of demurrage. In an action to recover freight and demurrage, *held*, that the reference in the bill of lading to the charter party was confined to the conditions of the latter instrument as to the payment of freight, and so, that the provisions of the charter party as to demurrage were not made part of the bill of lading, and defendants by receiving the cargo did not become liable to pay the rate specified, but the amount of damages sustained by the alleged unlawful detention was to be proved; and that in the absence of proof plaintiff was not entitled to recover nominal damages. *Dayton v. Parke.* 391

BILLS, NOTES AND CHECKS.

1. C. shipped a cargo of peas from Kingston, Canada, to Cape Vincent, consigned to a Kingston bank, care of plaintiff, a warehouseman at Cape Vincent. Plaintiff received the cargo and delivered to C. a warehouse receipt stating that the peas were held subject to the order of the consignee. C. drew a draft against the consignment on defendant, which was duly accepted by it under an agreement that it was to have possession of the cargo on payment of the draft, the warehouse receipt to be held meanwhile as security. The draft with the warehouse receipt attached as security, was discounted by said bank. Defendant, after acceptance and before maturity of the draft, took the cargo from plaintiff's possession without his permission. Defendant having failed to pay the draft, plaintiff paid it, on demand being made by the bank for the cargo, and thereupon the draft with the warehouse receipt was duly transferred to him.

Held, that plaintiff was entitled to recover of defendant the amount of the draft; that the provisions of the Penal Code (§ 633) forbidding a warehouseman from delivering to another than the holder of a warehouse receipt issued by him, the property covered by it, did not apply. *Burnham v. C. V. Seed Co.* 169

2. In an action against defendant as indorser of a promissory note, it appeared that by a composition agreement between plaintiff and other creditors and their insolvent debtor, they agreed to take forty per cent of their respective claims and to receive therefor four notes of the debtor, each for ten per cent, two to be indorsed by defendant. She, at plaintiff's request, indorsed all the four notes executed to it. The action was upon one of the notes, which by the composition agreement defendant was to indorse. *Held*, that plaintiff was entitled to recover; that the indorsement of the two notes not covered by the composition agreement was invalid, but this did not invalidate or affect the indorsement of the other two notes made pursuant to that agreement. *H. N. Bank v. Blake.* 404

BONDS.

1. The holder of bonds issued by a corporation, secured by a trust mortgage, are the real parties in interest, and when any emergency happens which makes a demand upon the trustees to foreclose the mortgage futile, and leaves the right of a bondholder, without other reasonable means of redress, this authorizes his appearance as plaintiff in an action to foreclose. *Ettlinger v. P. R. & C. Co.* 189
2. While it may be, as a general rule, that a surety upon the official bond of a special guardian, appointed to sell the real estate of an infant, is not liable until the remedies against his principal are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change

the facts upon which the liability of the surety depends, the infant will not be compelled to resort to it before bringing suit upon the bond. *Long v. Long.* 545

3. A special guardian appointed to sell certain real estate devised to two infants subject to a legacy, executed a bond to each infant for the faithful performance of his trust. Defendant was one of the sureties on one of the bonds. The guardian sold the real estate and paid the legacy from the proceeds. Defendant had presented a claim against the estate, which was disputed and referred under the statute, and he had recovered judgment thereon. The special guardian, without any order or direction of the court, paid over to defendant the balance of the purchase money to apply upon this judgment. Said guardian never rendered any account to the court of his proceedings and was never discharged from the trust. He died intestate, as did also the other surety. The estates of both were administered and distributed. Defendant was a son of the decedent and was the devisee of the residuary real estate of the latter, of which there was a large amount. In an action upon said bond, *held*, that the payment so made by the special guardian was unlawful, in violation of his trust, and a breach of the condition of the bond for which the surety was liable; that defendant's judgment was not a lien upon the lands devised to the infants, and was enforceable only in the regular course of administration; that if the personalty was insufficient to pay the debts, after it was exhausted, the residuary real estate was primarily chargeable, and in the absence of proof or findings showing beyond question that some definite sum of money necessary for the payment of the debts must necessarily become in the end a charge upon the lands devised to the infants, there was no equitable ground for a defense or basis for an allowance to defendant. *Id.*

4. Also *held*, that under the circumstances, an accounting in the court having jurisdiction of the guar-

dianship was not necessary before bringing suit on the bond. *Id.*

5. After the infants became of age they made an indorsement upon the account rendered to the surrogate by their general guardian, in which they expressed themselves satisfied therewith. In said account there was no reference to the fund in question here, and no part of it ever came to the hands of the general guardian. *Held*, that this was not a ratification of the disposition made of said fund; also, that the fact that the infants were represented by special guardian in proceedings for the settlement of the accounts of the administrator of the estate of the special guardian, appointed for the sale of the real estate, did not ratify the misappropriation, it not appearing that said accounts referred to or contained any information as to the disposition made of the purchase money. *Id.*

BOUNDARIES.

In an action of ejectment plaintiff claimed title under a deed to it from O. of the lot in question, which was part of a tract of land then owned by O.; after his death his son, his only heir at law, conveyed to H., under whom defendant claimed the tract; the deed reserved from the grant the lot conveyed to plaintiff. At the time of the conveyance to H. there was a fence around plaintiff's lot which had been built ten years previously. *Held*, that as the deed to H. recognized the title of plaintiff, and as its lot was practically located and identified, no one claiming under said deed could dispute such title. *Second M. E. Church v. Humphrey.* 137

BRIDGES.

1. The act of 1891 (Chap. 290, Laws of 1891), which authorizes and empowers the boards of supervisors of the counties of Kings and Queens to build a bridge, at a point specified, over navigable waters dividing the two counties, "or to show cause," etc., is in

contravention of the provision of the State Constitution (Art. 18, § 3) prohibiting the state legislature from passing local bills providing for building bridges. *People ex rel. v. Bd. Suprs. Queens Co.* 271

2. The duty imposed by the "County Law" of 1892 (§ 68, chap. 18, Laws of 1892) upon the boards of supervisors of two counties divided by navigable tide waters spanned by a bridge on a highway crossing such waters, to keep the same in repair, is mandatory, not discretionary, and when the reparation requires that the bridge shall be re-built, it is the duty of the two boards to re-build it. *Id.*

3. The performance of this duty may be compelled by mandamus. *Id.*

4. A citizen of one of the counties who is put to inconvenience by reason of the non-repair of the bridge, and so is injured by the inaction of the boards, is entitled to be a relator in proceedings by mandamus to compel the performance of their duty. *Id.*

5. The provision of the act of Congress of 1890 (§ 7, chap. 907), prohibiting the construction of such a bridge until its location and plan shall be approved by the secretary of war, does not justify inaction on the part of the boards of supervisors, and, *it seems*, the matter may be provided for in the peremptory writ. *Id.*

BROKERS.

1. The provision of the statute of New Jersey in relation to brokers selling real estate, which prohibits them from claiming commissions unless their authority to sell is in writing, applies only to brokers who are themselves authorized to make a sale; it does not apply to one given no authority to fix the price or terms of sale, but who is simply employed to find and bring a possible purchaser to the vendor and is to receive compensation in case a sale is effected. *Knauss v. Krueger B. Co.* 70
2. So, also, the rule that a broker employed to buy or sell, who is

invested with any discretion or upon whom his employer has a right to rely for the benefit of his skill or judgment, loses his right to compensation if he agrees to act in a similar capacity for the other party, does not apply to one simply employed to bring the parties together, and such an employment by the party desiring to sell does not prevent the acceptance of a similar employment from one wishing to purchase, and there is no violation of duty in such case on the part of the employee in agreeing for commissions from each party, or in failing to notify the one of his employment by the other. *Id.*

BURDEN OF PROOF.

The burden of proof is upon a defendant to establish an affirmative defense set up in his answer, and this burden is not changed by the presentation of evidence which *prima facie* establishes the defense. *Spencer v. C. M. L. Ins. Assn.* 505

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- Cuswell v. Davis* (58 N. Y. 223), distinguished. *Keasbey v. Brooklyn C. Works.* 471
- Lane v. Town of Hancock* (67 Hun, 623), reversed. *Lane v. Town of Hancock.* 511
- Long v. Long* (65 Hun, 595), reversed. *Long v. Long.* 545

Houghtailing v. Kilderhouse (1 N. Y. 580), distinguished. *Stafford v. Morning Journal Assn.* 601

Pratt v. Andrews (4 N. Y. 498), distinguished. *Stafford v. Morning Journal Assn.* 601

Young v. Johnson (123 N. Y. 226), distinguished. *Stafford v. Morning Journal Assn.* 601

Denise v. Swett (68 Hun, 188), reversed. *Denise v. Swett.* 602

U. M. Co. v. Lounsbury (41 N. Y. 368), distinguished. *Denise v. Swett.* 612

CAUSE OF ACTION.

See DEMURRAGE.
EJECTMENT.
FALSE IMPRISONMENT.
GUARANTY.
INJUNCTION.
MALICIOUS PROSECUTION.
NEGLIGENCE.
PARTITION.
SPECIFIC PERFORMANCE.

CERTIORARI.

1. Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of the nominations for offices to be filled at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city; in making the selection the board acts judicially, and its action may be reviewed by certiorari. *People ex rel. v. Martin.* 228

2. In proceedings by certiorari to review the action of said board in making such a selection, these facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator with a request that *The World*, the newspaper published by it, should be selected, which affidavit stated that the cir-

culatation of said newspaper exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners in substantiation of its claims. No other communication was had between the relator and the board until after the selection was made. Thereafter relator presented to the board an affidavit to the effect that the circulation of *The World* in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claim; this request the board denied, and refused to re-consider the decision made. In their return to the writ the police commissioners alleged that in making the designation they selected the newspapers which, according to the best information they could obtain, had the largest circulation within the city. *Held*, there was nothing in the record showing that the determination of the board was erroneous, as at the time of the designation it had been furnished with no evidence that *The World* had a larger circulation in the city than any other newspaper; that its circulation might be larger in the country, as stated in the first affidavit, but not as large in the city, and the second affidavit and offer came too late; that the court was bound to take the return as true, and it showed a full compliance with the statute. *Id.*

3. *It seems*, if the return is evasive or not sufficiently full, the relator could have compelled a further return (Code Civ. Pro. § 2135), but having elected to stand upon the return as made it was to be taken as true. *Id.*

CHARTER PARTY.

1. Where a charter party contains no provision for the payment of freight *pro rata itinere*, but simply provides for payment on delivery of the cargo at the port of discharge, freight is not earned except by performance of the

voyage and delivery as specified.
China M. Ins. Co. v. Force. 90

2. This question is not affected by the "law of the flag" under which the vessel sails. The obligation of the shipper is to be determined by the law of the place where the contract of affreightment was made. *Id.*

3. An Italian bark was chartered at New York to carry a cargo from that city to Rangoon, Burmah. By the terms of the charter party the freight was to be paid on delivery of the cargo at the port of discharge. Plaintiffs insured the cargo. Defendants advanced moneys to the master for necessary disbursements, who gave a draft for the amount, pledging the vessel and freight for its payment. This draft was forwarded to Rangoon for collection. The vessel was wrecked, while upon its voyage, on the coast of Burmah; it was abandoned and plaintiffs paid as for a total loss. Part of the cargo and of the ship's stores and furniture was saved, and the salvor filed a petition for salvage in a court of Rangoon of vice admiralty jurisdiction. Defendants' agent also filed a petition in the same court, setting forth the facts and praying for an order of arrest and sale of the ship, cargo, etc. An order of arrest and of sale of the property salvaged was granted, the proceeds to be brought into court, "reserving all questions as to the rights to salvage and of the rights of the parties to the suit." Sale was made and the proceeds deposited in court. Two orders were subsequently made by the court, one in the proceedings first mentioned, decreeing that the salvor was entitled to a sum stated; the other in the second proceeding, decreeing payment of the balance of the proceeds of sale of cargo upon defendants' claim, and payment was so made. In an action to recover of defendants the portion of the proceeds so paid to them, *held*, that while said court had jurisdiction to seize, to order a sale and payment of salvage, its decree summarily disposing of the surplus was not conclusive against

plaintiffs, who were not parties to the proceedings and had no opportunity to be heard; that the effect of the sale was simply to discharge all liens on the property and to transfer them to the proceeds; that the power of the court to act summarily against adverse parties, without notice, was limited to the seizure and sale and the award of salvage, and thereafter, although having possession of and jurisdiction over the surplus, it was bound to proceed in some regular way and upon some notice to determine who was entitled thereto; that, subject to the claim for salvage, the proceeds of the sale of vessel and cargo belonged to the owners and could not be disposed of on petition of a claimant, without notice to them, giving them a day in court; that defendants had no lien upon the proceeds of the sale of the cargo, as the contract of affreightment was not performed and no freight was earned; and that as plaintiffs, by the abandonment and payment as for a total loss, succeeded to all the rights of the owners of the cargo, they were entitled to the surplus so paid over to defendants. *Id.*

4. Defendant chartered a steamer to carry a cargo of lumber. The charter party provided that the vessel was to be loaded afloat; the charterer to bring the lumber alongside and load and stow it on the vessel and supply the dogs and chains necessary for handling it, the vessel simply to furnish steam if required to operate the steam winches; the cargo "to be delivered alongside at merchant's risk and expense, and to be received by the master and secured with the ship's dogs and chains when so delivered, and to be then at ship's risk," the charterer's responsibility to cease as soon as the lumber is shipped and bill of lading signed. It was also provided that if the cargo should "not be delivered to vessel," within the time specified, demurrage at a specified rate should be allowed. In an action to recover demurrage it appeared that there was no delay in bringing the cargo alongside, but only in loading and

stowing it. Defendant claimed that the delivery, a delay in which, under the charter party, authorized a charge for demurrage, was simply delivery alongside and did not include loading and stowing. *Held*, untenable; that the delivery referred to was the complete and final delivery to the vessel, and this did not occur until the lumber was loaded and stowed and so passed out of the custody and control of the charterer. *Baldwin v. S. T. Co.* 279

5. After demurrage begins to run, under and pursuant to the terms of a charter party, Sundays are not to be deducted. *Id.*

6. M. & Co. chartered plaintiff's schooner for a voyage from Charleston to New York. The charter party contained specific provisions for the payment of freight at a rate specified, and for the payment of a sum specified for each day's unlawful detention. The cargo was consigned to defendants, who were the owners thereof. The bill of lading provided for the delivery of the cargo to the consignees, "they paying freight * * * as per said charter party and its conditions." Nothing was contained therein upon the subject of demurrage. In an action to recover freight and demurrage, *held*, that the reference in the bill of lading to the charter party was confined to the conditions of the latter instrument as to the payment of freight, and so, that the provisions of the charter party as to demurrage were not made part of the bill of lading, and defendants by receiving the cargo did not become liable to pay the rate specified, but the amount of damages sustained by the alleged unlawful detention was to be proved; and that in the absence of proof plaintiff was not entitled to recover nominal damages. *Dayton v. Purke.* 391

CHATTEL MORTGAGE.

1. A chattel mortgage cannot, as matter of law, be given future effect as a lien upon personal property which at the time of the de-

livery of the mortgage was not in existence, actually or potentially, when the rights of creditors of the mortgagor have intervened; the mortgage can only operate on property in actual existence at the time of its execution. *R. D. Co. v. Rasey.* 570

2. While such a mortgage may, as between the parties, be regarded in equity as an executory agreement to give a lien when the property comes into existence, some further act thereafter is requisite to make it an actual and effectual lien as against creditors. *Id.*

3. Crops which are the annual product of labor and of the cultivation of the earth have no actual or potential existence before a planting. *Id.*

4. The lessee of certain farm lands executed a chattel mortgage by its terms covering, among other things, all the potatoes and beans "which are now * * * planted or which are hereafter * * * planted during the next year." The greater part of the planting of potatoes and all that of the beans was done after the delivery of the mortgage. After the planting the growing crops were levied upon and sold under an execution against the lessee, and plaintiff became the purchaser. The mortgagor subsequently foreclosed his mortgage and sold said crops to defendant, who took possession. In an action to recover possession, *held*, that the levy by the sheriff operated to transfer to him possession of the crops; that in the absence of proof of any act by the parties to the mortgage to create an actual lien, as against such possession, the equities of the mortgagee were ineffectual for any purpose; and that plaintiff was entitled to the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage. *Id.*

CITIES.

See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

1. Where a bond and mortgage was executed and delivered to G. upon the express understanding that he should advance thereon a sum specified, and that until the advance was made they were to be "invalid, void and no effect," and G. made no advance, but assigned the instrument to S., who took in good faith and for value, *held*, that the mortgage was invalid in the hands of the assignee; and that an action was maintainable to have the same canceled as a cloud on plaintiff's title. *Rappe v. Gottlieb*. 184

2. Defendant, a club incorporated under the act of 1875 (Chap. 267, Laws of 1875), as amended, and owning a parcel of land for its corporate purposes, sold and conveyed a lot to plaintiff. By the terms of the deed the purchaser became a member of the club and held subject to its rules and regulations. These provided for assessments to be made for purposes specified and for a forfeiture of title in case a member failed to pay an assessment as prescribed. An assessment was made by the board of managers, and upon plaintiff's refusal to pay he was served with a notice that his title and membership would be forfeited, unless at a date specified he appeared before the board and showed cause to the contrary. Plaintiff thereupon brought this action to have the action of the board rescinded, as a cloud on his title, and to restrain the forfeiture. The assessment on its face showed it was made in part for permanent improvements. Plaintiff claimed that no assessments could be made for such purposes. *Held*, that conceding this claim to be correct there was no cloud on title, as the illegality appeared upon the face of the papers, and the facts the association would be compelled to prove to enforce at law the assessment or forfeiture would themselves show the invalidity. *Whiteside v. N. C. Assn.* 585

CLUBS.

See SOCIAL AND RECREATION SOCIETIES.

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COLLATERAL INHERITANCE TAX ACT.

1. The will of C. created trusts for the benefit of her two daughters and two grandchildren named, each trust for the life of the beneficiary. The remainders were given one half to such of her nephews, and one-half to such of her nieces named as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue to such issue. *Held*, that the remainders were not liable to taxation under the Collateral Inheritance Tax Act of 1885 (Chap. 483, Laws of 1885) until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable, or to others in whose possession it would be exempt, as in case of the death of the nephews or of the nieces named prior to the expiration of the trust the one-half of the remainder would go to the heirs at law of the testatrix; also, that conceding there was upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate. *In re Curtis*. 219

2. The intent of said law was to subject only real and beneficial in-

terests to taxation, and when it is only in the chance of uncertain future events that such an interest will alight where it will be taxable at all, a delay until the contingency is solved is necessary and proper.

Id.

COMPENSATION (FOR PRIVATE PROPERTY TAKEN FOR PUBLIC PURPOSES).

See EMINENT DOMAIN.

CONDITIONS.

1 The rule applicable to deeds or writings conveying or relating to the conveyance of real estate or an interest therein, that a delivery cannot be made conditionally, and that when delivered to a party the delivery operates at once and a condition attached thereto is unavailable, is not applicable to an instrument not in any way affecting real estate and which does not require a seal for its validity, and this, although the instrument is in fact sealed. *Blewitt v. Boorum*.

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2. In an action, therefore, upon a contract executed under seal, but which does not require a seal for its validity, it is competent for defendant to show that the instrument was executed upon condition that it was not to operate as a contract until the performance by plaintiff of some prescribed act, and this may be shown by oral evidence.

Id.

3. A condition in a policy of insurance declaring it to be void in case the interest of the insured be other than unconditional absolute ownership, will not operate to avoid it after a loss, where the company, before issuing the policy, were advised and had knowledge of the fact that the insured was not the sole owner, or that the property was incumbered. The condition does not apply to facts so disclosed. *O'BRIEN, J.; FINCH and PECKHAM, JJ., concurring; EARL and GRAY, JJ., dissenting. Forward v. Contl. Ins. Co.*

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CONSIGNOR AND CONSIGNEE.

1. While a consignee, by simply accepting the goods consigned to him, and in the absence of any provision in the bill of lading providing for the payment of demurrage by him, is not liable therefor where he is owner of the cargo, and the vessel is through his fault detained an unreasonable length of time at the port of discharge, he is liable for damages in the nature of demurrage. *Dayton v. Parke*.

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2. In such case, however, not only must an unreasonable detention be proved, but, also, the damages, their nature and amount. Damages will not be presumed simply from proof of unlawful detention, and so, if plaintiff fail to prove any damages he is not entitled to judgment for even nominal damages.

Id.

CONSTITUTION.

1. As under the constitutional limitations forbidding the division of towns in making an apportionment of assembly districts, and requiring each district to be of convenient and contiguous territory, absolute equality of population in the districts is not possible, a slight variation will not warrant or justify an application to the courts for redress. To authorize this there must be a grave, palpable and unreasonable deviation, so that when the facts are presented argument will not be necessary to show that such a deviation has been intentionally made. *In re Baird*.

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2. The constitutional prohibition against the division of towns in making the apportionment does not apply to wards of a city. A ward, although treated as a town for some purposes of municipal government, is not a town within the meaning of said prohibition, and so a ward may be divided.

Id.

3. The Constitution does not require the districts to be made up of compact territory, and the fact that districts in a city are irregu-

lar in form does not establish any actual inconvenience. *Id.*

CONSTITUTIONAL LAW.

1. The legislature has power to pass a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract. *Clark v. The State.* 101
2. Accordingly held, that the act of 1889 (Chap. 380, Laws of 1889), which took effect in June of that year, regulating the wages of day laborers employed by the state or any officer thereof on public works, was constitutional. *Id.*
3. The act of 1891 (Chap. 290, Laws of 1891), which authorizes and empowers the boards of supervisors of the counties of Kings and Queens to build a bridge, at a point specified, over navigable waters dividing the two counties, "or to show cause," etc., is in contravention of the provision of the State Constitution (Art. 18, § 3) prohibiting the legislature from passing local bills providing for building bridges. *People ex rel. v. Bd. Suprs. Queens Co.* 271
4. The legislature may release property which has been assessed for taxation, and this power may be exercised in any way and at any time during and before the completion of the proceedings for taxation. *People ex rel. v. Comrs. Taxes, etc.* 848
5. As at the time of the ratification of the judiciary article of the State Constitution, which provides that the Superior Court of New York is continued "with the powers and jurisdiction" it then had (§ 12, art. 6), said court had jurisdiction of an action by a resident of the state, although not a resident of the city, against a foreign corporation to recover damages for personal injuries caused by negligence (Code Pro. § 427), said court has now jurisdiction of such an action, notwithstanding the provision of the Code of Civil Procedure (sub. 7,

§ 263) in reference to the jurisdiction of superior city courts. Any legislation attempting to limit the jurisdiction is unconstitutional. *Flynn v. Central R. R. of N. J.* 439

6. The provisions of the State Banking Law (§§ 118, 130, chap. 689, Laws of 1892), permitting savings banks to keep a fund on deposit in State or National banks, and providing that in case the bank receiving the deposit becomes insolvent, the savings bank shall have a preference, is not in conflict with the National law; and a savings bank having deposits with a National bank when the latter became insolvent is entitled to a preference in payment out of the assets of the insolvent bank in the hands of a receiver, after its circulating notes have been provided for and all the conditions of the National law complied with. *E. S. Bank v. Davis.* 590

CONSTRUCTION (OF WRITTEN INSTRUMENTS).

1. The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result. *Stokes v. Weston.* 433
2. So, also, the law favors the vesting of estates, and in case a will contains apt words to dispose of the testator's entire estate that construction will be given to it. *Id.*
3. When it is necessary in order to effectuate the plain purposes of a statute, the word "or" may be changed to "and" or "nor." *Folmes v. City of Amsterdam.* 118
4. In construing amendments to a statute the original act with all its amendments must be read together and viewed as one act passed at the same time, and no part of the original or the amendments is to be held inoperative if they can all be made to stand and work together. *Lyon v. Manhattan R. Co.* 298

5. The rule applicable to deeds or writings conveying or relating to the conveyance of real estate or an interest therein, that a delivery cannot be made conditionally, and that when delivered to a party the delivery operates at once and a condition attached thereto is unavailable, is not applicable to an instrument not in any way affecting real estate and which does not require a seal for its validity, and this, although the instrument is in fact sealed. *Blewitt v. Boorum*. 357

6. An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language he is entitled to the benefit of the doubt. *Blackman v. Striker*. 555

7. A deed must be held to convey all the interest the grantor has in the land, unless the intent to pass a less interest appears by express terms, or is necessarily implied from the terms of the grant. *Id.*

CONTRACTS.

1. Defendant, being the owner of a store in which he carried on the jewelry business, entered into an agreement with plaintiff, who was engaged in the stationery business, by which the former agreed to furnish for the use of the latter, one show case and suitable shelving in the store "for the purpose of conducting a stationery business," for the term of five years, plaintiff to pay therefor a percentage on the gross amount of his sales. Plaintiff entered the store and carried on the stationery business therein for two years, when defendant removed to a new store, taking away the show case and shelving he had furnished for plaintiff's use, furnishing him no others in their place; he also rented the store, one-half for a second-hand clothing business, the other half for a dyeing establishment. In an action to recover damages, *held*, that the agreement contemplated that the stationery business should become a department in defendant's store; that he could

not, after plaintiff had entered upon that business, so change the character of the business carried on, and the arrangements of the store, as to make it unfit and unsuitable for plaintiff's business, and so destroy it; that the facts justified a finding that defendant, by his acts, had ousted plaintiff, broken up his business and violated his agreement: also, that the agreement did not create the relation of landlord and tenant, and so the rule of damages proper, where that relation exists, did not apply; but that plaintiff was entitled to recover the value of the agreement to him at the time of the breach. *Dickinson v. Hart*. 183

2. Plaintiff proved the gross amount of his sales for the two years he carried on the business, the amount of his net profits, also the income he was able to make elsewhere during the succeeding year, and what he was able to earn after his business in defendant's store was broken up. *Held*, the evidence furnished a sufficient basis for an award of damages. *Id.*

3. Plaintiff entered into a contract with M. & R. to do the mason work on certain houses to be constructed by them, in pursuance of a contract between them and defendants. Defendants executed a guaranty to plaintiff for the payment of the several sums agreed to be paid to him by M. & R., at the times and in the manner stated. In an action upon the guaranty these facts appeared: Plaintiff performed the contract on his part until he was notified by M. & R. to stop, and further performance was prevented by their failure to furnish timbers, as agreed, so that the work could be carried on. Plaintiff was at all times ready, able and willing to carry on his contract. Defendants had carried out their contract with M. & R., and the discontinuance of the work was not rendered necessary by any failure on their part. Plaintiff had been paid for the work done by him up to the time of the discontinuance, and claimed to recover the balance of the contract price, after deducting therefrom the sums paid, and what it would

cost to complete the work. *Held*, untenable; that the guaranty was not of the whole and entire performance by M. & R., but simply of payment of the installments specified in the contract, at certain periods as the work progressed, and when the house arrived at certain stages; and as the conditions under which the unpaid installments were to become due had not happened, the complaint was properly dismissed. *De Luika v. Goodwin*. 194

4. Where a creditor signs a composition agreement, under a secret agreement with the debtor, giving him a preference or some undue advantage over other creditors, this does not, as to such creditor, vitiate the composition agreement. The two agreements are to be considered as separate and independent, and, while the secret agreement is fraudulent and void, the composition agreement remains valid and enforceable. *Hanover N. Bank v. Blake*. 404

5. Plaintiff's complaint alleged in substance the formation of an association by plaintiff and the defendants, manufacturers engaged in the same business, under an agreement which provided that the members were to pay into a common fund a certain sum per pound on all their manufactures, to form a guaranty fund and for other purposes; the share of each party in said fund to be forfeited in case of his expulsion, as provided for; that plaintiff had performed the agreement on his part, but that the association had, in violation of the agreement and without giving him a hearing, found him in default in making payments to said fund, and threatened to expel him. The relief sought was that defendants be restrained from interfering with plaintiff's rights in the association, and from forfeiting its interests in the guaranty fund, etc. The answer denied the alleged unlawful actions on the part of the association, and the evidence was upon the issues so made. Both parties conceded on the trial that the agreement was illegal, because it

prices, but it did not appear that plaintiff at any time during the trial repudiated or disaffirmed it or claimed to recover back the money paid because of its illegality. *Held*, that the refusal of the trial court to grant plaintiff any relief so far as this action was concerned, because it was proceeding in affirmance, and not in repudiation of the contract, was proper. *P. B. Co. v. K. B. Co.* 425

6. Where the performance of a contract depends upon the continued existence of a person or thing which is assumed as the basis of the agreement, the death of the person or the destruction of the thing terminates the obligation. *Lorillard v. Clyde*. 456

7. So, also, if after a contract is made the law interferes and makes subsequent performance impossible, the party is held to be excused. *Id.*

8. Plaintiff and defendants, as subcontractors, furnished material and labor in the construction of a building and filed liens therefor; the contractor having failed and abandoned the contract, and the owner having advertised for bids for the completion of the work, they agreed that they would each put in bids. Plaintiff's bid was accepted, and the parties thereupon entered into a contract, pursuant to the terms of which a committee of their number was selected with power to carry on the work, make all necessary contracts for labor and materials, and certain of the defendants became plaintiff's bondsmen. To these bondsmen plaintiff assigned his interest in the payments, which was to be used in defraying the expenses of performance, and it was agreed that out of the payments should first be paid all just claims for material and labor, and if any surplus remained it was to be equally divided among the parties, except that plaintiff was to receive as his share ten per cent of the actual cost of the labor and materials. If a deficiency resulted, the parties agreed "to pay the same in the same proportion as the surplus was to have been

divided." The performance of plaintiff's contract with the owner resulted in a loss. In an action upon the contract with defendants, plaintiff claimed that, notwithstanding the loss, he was entitled to the specified percentage. *Held*, untenable; that the enterprise was a joint one and the parties engaged in it occupied in respect to it the relation of co-partners; that only in case of a surplus was plaintiff entitled to anything. *Camp v. Treanor*. 478

9. Plaintiff, under contract with the committee, furnished a portion of the required material and labor. *Held*, that he was entitled to recover a balance unpaid therefor. *Id*.

10. Plaintiff, being the owner of a patented device, to be used in the manufacture of wagons, entered into an agreement with the firm of J. & W., of which firm defendant is the surviving partner, by which he granted to that firm the right to use the device upon all wagons made by it, and to grant licenses to others to use it, the firm to pay him one dollar and twenty-five cents for each wagon made and sold, and one-fourth of the amount received for licenses granted. Some time after the execution of the contract said firm began the manufacture of "gears," in the first place for the purpose of advertising its wagons. These gears were gradually introduced to the trade, and sold by the firm to dealers as a separate article; each cost about \$8 and were sold for \$9; the wagons were sold at prices ranging from \$100 to \$200. In an action upon the contract plaintiff claimed that the gears were to be treated as wagons, and that he was entitled to the agreed royalty for each one sold. *Held*, untenable; also that the manufacture and sale of the gears was not included in the right to grant licenses, and so plaintiff was not entitled to one-fourth of the receipts; but that such a use of the patented article was not provided for or granted by the contract, and as plaintiff had consented to the use he could not claim an infringement of his

patent, but was simply entitled to recover the reasonable value of such use. *Griffin v. White*. 589

11. Defendants owned a wharf in the East river. Plaintiff's vessel, which had been chartered by defendants, while approaching the wharf to deliver a cargo consigned to them, struck a rock in the bottom of the river about seventy feet from the wharf and was injured. In an action to recover damages it appeared that all the approaches to the wharf were safe, but the one over the rock, and hundreds of vessels had gone to the wharf in safety, in all stages of the tide. A surveyor who had examined and located the rock testified, in substance, that in his judgment it was not part of the bottom of the river, but had fallen in there. It also appeared that previous to the accident it had not been heard of and no similar accident had previously happened. Defendants had caused the basin in front of their wharf to be dredged out, and it did not appear that the rock was in the ordinary approach to the wharf, or that defendants had any control of the part of the river where it was, or had any right to remove it. Plaintiff claimed that defendants had contracted to give him, for the approach of his vessel to the wharf, sixteen feet of water. *Held*, that conceding the evidence established a contract, no breach thereof was shown. *McCaldin v. Parke*. 564

— When evidence fails to show substantial performance of contract for building improvements.

See Boughton v. Smith. 674

See BILL OF LADING.

CHARTER PARTY.

INSURANCE (CASUALTY).

INSURANCE (LIFE).

INSURANCE (MARINE).

INSURANCE (FIRE).

GUARANTY.

SALES.

CORPORATIONS.

1. The parties, who were engaged in and were competitors in the busi-

ness of water transportation, entered into an agreement to combine their interests. This provided that a corporation should be organized, each to contribute thereto an equal amount of capital in the vessels and properties then employed by them, defendants to have the management of the business and to receive commissions for its performance. In consideration thereof defendants guaranteed to plaintiff a dividend of not less than seven per cent per annum on his shares for seven years. Dividends when earned were to be declared and paid quarterly, and during the seven years neither party was to be interested in any competing steam water line without the consent of the other. The corporation was organized and the business carried on by it for about five years, when, by the judgment in an action brought by the attorney-general in the name of the People, the corporation was dissolved and a receiver appointed. In an action to recover the amount so guaranteed for the two years subsequent to the dissolution, *held*, that the parties contracted upon the assumption of corporate existence during the period covered by the guaranty; that the dissolution took away for the future the whole consideration upon which the guaranty was based, and so relieved the defendants from liability thereon. *Lorillard v. Clyde*. 456

2. It was claimed by plaintiff that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and so, they were estopped from interposing it as a defense. The grounds of forfeiture upon which the judgment in the People's action was based were technical violations of the statute under which the corporation was organized, not affecting any public interests, and for some of them plaintiff was as much responsible as defendants. The action was brought upon the application of plaintiff; he gave the bond required by the attorney general as security for costs, and also verified the complaint. *Held*, that

plaintiff owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment of dissolution proceeded; that as between the parties themselves there was no cause for dissolution; and, as plaintiff procured the judgment, that defendants were not precluded from availing themselves of it as a defense. *Id*.

8. An action for malicious prosecution may, in a proper case, be maintained against a corporation. *Willard v. H., B. & H.* 492

See INSURANCE (CASUALTY).
 INSURANCE (MARINE).
 INSURANCE (FIRE).
 INSURANCE (LIFE).
 INSOLVENT CORPORATIONS.
 MUNICIPAL CORPORATIONS.
 RAILROAD CORPORATIONS.
 RELIGIOUS CORPORATIONS.
 SOCIAL AND RECREATION SOCIETIES.

COSTS.

Costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution, and actions for malicious prosecution based thereon are not to be encouraged. *Ferguson v. Arnou*. 580.

COUNTIES.

See KINGS (COUNTY OF).
 QUEENS (COUNTY OF).

COURTS.

See COURT OF APPEALS.
 SUPERIOR COURTS.
 SUPREME COURT.
 SURROGATES' COURTS.

COURT OF APPEALS.

See APPEAL.

COVENANT.

1. One in possession of land merely, without other actual title, has an

estate in the land which he may transfer, and in case he conveys with covenant of warranty running to the grantee, his heirs and assigns, he transfers an estate to which his covenant attaches, and it may be enforced by one succeeding to the grantee's title. *Mygatt v. Coe.* 78

2. Certain real estate was conveyed by an assumed owner to the wife of defendant, severally and in her individual right. Defendant joined with his wife in a conveyance of the land, which contained a covenant running to the grantee, "her heirs and assigns," to the effect that the wife was seized of a full estate in the land. Defendant was at the time in possession and surrendered the possession to the grantee, and the grantors jointly received the consideration paid. The grantee executed a mortgage upon the land, and subsequently the owner of the equity of redemption was evicted by the true owners. The mortgage was thereafter foreclosed. In an action upon the covenant, brought by the purchasers upon the foreclosure sale, *held*, that the covenant ran with the land; that upon execution of the mortgage and subsequent conveyance, it went to the mortgagee and the owner of the equity of redemption in proportion to their respective rights; that by the foreclosure and sale the purchasers alone became entitled to sue upon the covenant, and so the action was maintainable. *Id.*

CRIMES.

Upon trial of an indictment under the provision of the Penal Code (§ 654), declaring it to be a crime, punishable as prescribed, where a person "unlawfully destroys or injures any real or personal property of another," these facts appeared: D. unlawfully placed a boat upon a pond owned by K.; he refused to remove it when required so to do by K., and several times, when the latter took it out of the water, he replaced it, and finally chained it to a tree to prevent further removal. Defendants, acting under instructions of

K., to protect his possession from the trespass for which the boat was brought to the pond and used, and acting under advice of counsel, openly and without concealment took the boat from the water and broke it up. *Held*, that the evidence did not warrant a verdict against defendants, and the denial of a motion to set aside such a verdict was error; that the destruction of the boat, the instrument with which a persistent, repeated and defiant trespass had been perpetrated, was justifiable. *People v. Kane.* 366

CRIMINAL ACTIONS.

See FORGERY.

CRIMINAL TRIAL.

1. Upon the trial of an indictment for forgery it appeared that defendant, who was president of a life insurance association, with another person employed by it to adjust losses, settled a claim against it for \$400. The claimant was induced by fraud to sign a written instrument releasing his claim, in which the sum paid was stated to be \$1,400, he supposing the sum stated therein to be that paid. Defendant drew \$1,400 from the treasury of the association and either he or his associate retained and fraudulently appropriated \$1,000 thereof. The release was sent to the office of the company and treated as a record of settlement of the claim for \$1,400 and a voucher for the disbursement of that sum. Defendant was convicted of forgery in the third degree. *Held*, error; that the offense committed by him was not forgery. *People v. Underhill.* 38
2. The provision of the Code of Civil Procedure (§ 46) forbidding a judge from sitting as such in a cause if he is related to any party to the controversy within the degree specified, applies to all trials, civil and criminal. *People v. Connor.* 130
3. Where, therefore, defendant was convicted of a crime in a Court of

Sessions, one member of which was related to him within the sixth degree, *held*, that the court was without jurisdiction, the result a mistrial, and no bar to another trial. *Id.*

4. On a second trial, before a court properly constituted, defendant interposed the plea of not guilty, also a special plea of the former trial and conviction. The pleas were directed to be and were tried separately before the same jury; the special plea being first tried, and the issue determined in favor of the People. Defendant's counsel objected to further proceedings, asking to have them suspended until the questions already tried could be reviewed on appeal. This was denied. Said counsel then asked permission to ask each of the jurors as to any bias formed from the evidence and proceedings upon the special plea. This was also denied. *Held*, no error; that defendant was not entitled to separate trials before separate jurors of the issues, but to but one trial and one jury; that the order in which the issues were disposed of was in the discretion of the court, and it had power to direct them to be tried separately or together; and that although they were tried separately, there was but one continuous proceeding. *Id.*

5. Upon trial of an indictment under the provision of the Penal Code (§ 654), declaring it to be a crime, punishable as prescribed, where a person "unlawfully destroys or injures any real or personal property of another," these facts appeared: D. unlawfully placed a boat upon a pond owned by K.; he refused to remove it when required so to do by K., and several times, when the latter took it out of the water, he replaced it, and finally chained it to a tree to prevent further removal. Defendants, acting under instructions of K., to protect his possession from the trespass for which the boat was brought to the pond and used, and acting under advice of counsel, openly and without concealment took the boat from the water and broke it up. *Held*, that the

evidence did not warrant a verdict against defendants, and the denial of a motion to set aside such a verdict was error; that the destruction of the boat, the instrument with which a persistent, repeated and defiant trespass had been perpetrated, was justifiable. *People v. Kane.* 366

CROPS.

1. Crops which are the annual product of labor and of the cultivation of the earth have no actual or potential existence before a planting. *R. D. Co. v. Rasey.* 570
2. The lessee of certain farm lands executed a chattel mortgage by its terms covering, among other things, all the potatoes and beans "which are now * * * planted or which are hereafter * * * planted during the next year." The greater part of the planting of potatoes and all that of the beans was done after the delivery of the mortgage. After the planting the growing crops were levied upon and sold under an execution against the lessee, and plaintiff became the purchaser. The mortgagor subsequently foreclosed his mortgage and sold said crops to defendant, who took possession. In an action to recover possession, *held*, that the levy by the sheriff operated to transfer to him possession of the crops, that in the absence of proof of any act by the parties to the mortgage to create an actual lien, as against such possession, the equities of the mortgagee were ineffectual for any purpose; and that plaintiff was entitled to the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage. *Id.*

DAMAGES.

1. Defendant, being the owner of a store in which he carried on the jewelry business, entered into an agreement with plaintiff, who was engaged in the stationery business, by which the former agreed to furnish for the use of the latter,

- one show case and suitable shelving in the store "for the purpose of conducting a stationery business," for the term of five years, plaintiff to pay therefor a percentage on the gross amount of his sales. Plaintiff entered the store and carried on the stationery business therein for two years, when defendant removed to a new store, taking away the show case and shelving he had furnished for plaintiff's use, furnishing him no others in their place; he also rented the store, one-half for a second-hand clothing business, the other half for a dyeing establishment. In an action to recover damages, *held*, that the agreement contemplated that the stationery business should become a department in defendant's store; that he could not, after plaintiff had entered upon that business, so change the character of the business carried on, and the arrangements of the store, as to make it unfit and unsuitable for plaintiff's business, and so destroy it; that the facts justified a finding that defendant, by his acts, had ousted plaintiff, broken up his business and violated his agreement; also, that the agreement did not create the relation of landlord and tenant, and so the rule of damages proper, where that relation exists, did not apply; but that plaintiff was entitled to recover the value of the agreement to him at the time of the breach. *Dickinson v. Hurt*. 183
2. Plaintiff proved the gross amount of his sales for the two years he carried on the business, the amount of his net profits, also the income he was able to make elsewhere during the succeeding year, and what he was able to earn after his business in defendant's store was broken up. *Held*, the evidence furnished a sufficient basis for an award of damages. *Id.*
3. Where a lessor of premises leased and occupied for business purposes has been evicted and his business broken up by the unlawful acts of his landlord, the prospective profits of his business for the remainder of the term is a

proper item of damages. *Snow v. Pulitzer*. 263

4. While a consignee, by simply accepting the goods consigned to him, and in the absence of any provision in the bill of lading providing for the payment of demurrage by him, is not liable therefor, where he is owner of the cargo, and the vessel is through his fault detained an unreasonable length of time at the port of discharge, he is liable for damages in the nature of demurrage. *Dayton v. Parke*. 391
5. In such case, however, not only must an unreasonable detention be proved, but, also, the damages, their nature and amount. Damages will not be presumed simply from proof of unlawful detention, and so, if plaintiff fail to prove any damages he is not entitled to judgment for even nominal damages. *Id.*

DEATH.

1. The cause of action given by the statute (Code Civ. Pro. §§ 1902-1905) to the executors or administrators of a deceased person, to recover damages for negligence causing his death, is no part of the assets of his estate; it is not subject to the payment of his debts or to the ordinary rules applicable to the settlement and administration of the estates of deceased persons. *Stuber v. McEntee*. 200
2. The claim cannot be barred or released before suit except by some person who has at the time authority to bring the action. *Id.*
3. In an action under the statute it appeared that defendant paid to one of the plaintiffs before his appointment as administrator a sum of money, he giving a receipt therefor which stated that the payment was for all expenses caused by the death, and that he had no further claim against defendant. *Held*, that the receipt was not a settlement of the claim or a bar to the action. *Id.*
4. *It seems* that in such case defendant would be entitled to show that

the money paid was used to pay the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in estimating the damages. *Id.*

DEBTOR AND CREDITOR.

1. Where a creditor signs a composition agreement, under a secret agreement with the debtor, giving him a preference or some undue advantage over other creditors, this does not, as to such creditor, vitiate the composition agreement. The two agreements are to be considered as separate and independent, and, while the secret agreement is fraudulent and void, the composition agreement remains valid and enforceable. *Hanover N. Bank v. Blake.* 404
2. In an action against defendant as indorser of a promissory note, it appeared that by a composition agreement between plaintiff and other creditors and their insolvent debtor, they agreed to take forty per cent of their respective claims and to receive therefor four notes of the debtor, each for ten per cent, two to be indorsed by defendant. She, at plaintiff's request, indorsed all the four notes executed to it. The action was upon one of the notes, which by the composition agreement defendant was to indorse. *Held*, that plaintiff was entitled to recover; that the indorsement of the two notes covered by the composition agreement was invalid, but this did not invalidate or affect the indorsement of the other two notes made pursuant to that agreement. *Id.*
3. *It seems*, that while in case of a secret executed agreement giving a preference to one of the creditors signing a composition agreement, the innocent creditors may elect to refuse to be bound by that agreement, if the secret agreement is executory they may not so elect. *Id.*
4. The right of a creditor to bring an action to set aside a fraudulent transfer of property made by his debtor, does not accrue until the recovery of a judgment against

the debtor and the return of an execution thereon unsatisfied. Until that time, therefore, the Statute of Limitations does not begin to run against such a cause of action. (Code Civ. Pro. § 880.) *Weaver v. Haviland.* 534

5. The provision of the Code of Civil Procedure declaring that in "an action to procure a judgment, other than a sum of money, on the ground of fraud * * * the cause of action * * * is not deemed to have accrued until the discovery * * * of the facts constituting the fraud," does not make the time of the discovery of the fraud in such a transfer the time of the accruing of the right of action by the creditor, in a case where the fraud was known before the creditor had established his claim by judgment. It simply provides for a class of cases where the right of action was perfect, but the fraud was not until thereafter discovered. *Id.*
6. P. sold and assigned a mortgage on lands in Michigan to F., plaintiff's assignor, for the sum of \$2,600, which sum she falsely represented was due and unpaid thereon, when in fact the amount was but \$2,100. F. brought an action in Michigan against P. to recover back the excess, and recovered judgment. In 1881, and shortly after that recovery, P. transferred her property to defendant, and delivered to him the money received for the assignment, without consideration, and for the purpose of placing her property beyond the reach of creditors. An action was brought here upon the Michigan judgment, and judgment recovered against P. in 1886, upon which execution was issued and returned unsatisfied. In this action, brought within six years thereafter, to set aside the fraudulent transfer to the defendant, *held*, that the action was not barred by the Statute of Limitations; also, that the fact that an action for money had and received might have been maintained by F. against defendant to recover the amount overpaid, immediately after the money came to his hands, and that this cause of action was

barred by the statute, did not affect the result here, as the two causes of action were entirely distinct, and the present one was in no way dependent upon the other.

Id.

7. A chattel mortgage cannot, as matter of law, be given future effect as a lien upon personal property which at the time of the delivery of the mortgage was not in existence, actually or potentially, when the rights of creditors of the mortgagor have intervened; the mortgage can only operate on property in actual existence at the time of its execution. *R. D. Co. v. Rasey*. 570

DEED.

1. Certain real estate was conveyed by an assumed owner to the wife of defendant, severally and in her individual right. Defendant joined with his wife in a conveyance of the land, which contained a covenant running to the grantee, "her heirs and assigns," to the effect that the wife was seized of a full estate in the land. Defendant was at the time in possession and surrendered the possession to the grantee, and the grantors jointly received the consideration paid. The grantee executed a mortgage upon the land, and subsequently the owner of the equity of redemption was evicted by the true owners. The mortgage was thereafter foreclosed. In an action upon the covenant, brought by the purchasers upon the foreclosure sale, *held*, that the covenant ran with the land; that upon execution of the mortgage and subsequent conveyance, it went to the mortgagee and the owner of the equity of redemption in proportion to their respective rights; that by the foreclosure and sale the purchasers alone became entitled to sue upon the covenant, and so the action was maintainable. *Mygatt v. Coe*. 78
2. In an action of ejectment plaintiff claimed title under a deed to it from O. of the lot in question, which was part of a tract of land then owned by O.; after his death his son, his only heir at law, con-

veyed to H., under whom defendant claimed the tract, the deed reserved from the grant the lot conveyed to plaintiff. At the time of the conveyance to H. there was a fence around plaintiff's lot which had been built ten years previously.

Held, that as the deed to H. recognized the title of plaintiff, and as its lot was practically located and identified, no one claiming under said deed could dispute such title. *Second M. E. Church v. Humphrey*. 187

3. Where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power, unless coupled with a trust, is not imperative, but its execution depends entirely upon the will of the grantor. *Towler v. Towler*. 871
4. T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by will a life estate in one-third thereof to "any hereafter-taken wife." The grantor thereafter married, and died without executing the power. *Held*, that the widow was not entitled to any interest in the land; that the reservation at most created a mere power, and so, to be executed or not at the pleasure of the grantor. *Id.*
5. As to whether the reservation can be treated as a power within the meaning of the Revised Statutes (1 R. S. 732, § 105) *quære*. *Id.*
6. An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language, he is entitled to the benefit of the doubt. *Blackman v. Striker*. 555
7. A deed must be held to convey all the interest the grantor has in the land, unless the intent to pass a less interest appears by express terms, or is necessarily implied from the terms of the grant. *Id.*
8. Prior to 1782 the heirs of J. who, as such, were tenants in common of a farm, which was within the corporate limits of the city of New

York, entered into an agreement for the purpose of partitioning the same, pursuant to which the farm was divided into parcels; one of these contained a family burying ground lot. One parcel was allotted to each of the tenants in common, and partition deeds were executed. The agreement provided that the burying ground lot should remain and continue the family burying ground, and whoever of the tenants in common should take the parcel containing the same, and should thereafter sell, should reserve said lot in the deed to the purchaser for the purpose specified, "with full liberty to pass and repass as occasion shall require." In 1782 M., one of the tenants in common to whom said parcel was allotted, conveyed the same by deed to another party to the agreement, which deed contained a clause "saving, excepting and reserving" to the heirs of J. the burying ground lot, "with free ingress, egress and regress into, out of and from the same, to bury the dead, etc., forever." No burials were made in the lot after 1840. Said parcel remained intact until 1885, when it was divided, and immediately thereafter the owner of the portion containing the burying ground took possession, removed the remains of the dead buried there, and proceeded to erect a building. In 1889 the heirs of M. conveyed to plaintiff all their right, title and interest in and to the lands of which J. died seized. In an action of ejectment to recover said burying ground lot, *held*, that M. intended to and did convey the fee of the parcel allotted to him subject only to an easement in said lot for burial purposes; that, therefore, plaintiff failed to show a legal title, and was not entitled to recover. *Id.*

DEFENSES.

An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track of the road, in the absence of evidence showing that the damages awarded rested to any extent upon the form or manner of constructing the crossings, is

no defense to an action brought to compel defendant to construct an underground crossing. *Beardsley v. Lehigh Valley R. Co.* 173

DELIVERY.

1. The rule applicable to deeds or writings conveying or relating to the conveyance of real estate or an interest therein, that a delivery cannot be made conditionally, and that when delivered to a party the delivery operates at once and a condition attached thereto is unavailable, is not applicable to an instrument not in any way affecting real estate and which does not require a seal for its validity, and this, although the instrument is in fact sealed. *Blewitt v. Boorum.* 357
2. In an action, therefore, upon a contract executed under seal, but which does not require a seal for its validity, it is competent for defendant to show that the instrument was executed upon condition that it was not to operate as a contract until the performance by plaintiff of some prescribed act, and this may be shown by oral evidence. *Id.*

DEMURRAGE.

1. Defendant chartered a steamer to carry a cargo of lumber. The charter party provided that the vessel was to be loaded afloat; the charterer to bring the lumber alongside and load and stow it on the vessel and supply the dogs and chains necessary for handling it, the vessel simply to furnish steam if required to operate the steam winches; the cargo "to be delivered alongside at merchant's risk and expense, and to be received by the master and secured with the ship's dogs and chains when so delivered, and to be then at ship's risk," the charterer's responsibility to cease as soon as the lumber is shipped and bill of lading signed. It was also provided that if the cargo should "not be delivered to vessel," within the time specified, demurrage at a specified rate should be allowed.

In an action to recover demurrage it appeared that there was no delay in bringing the cargo alongside, but only in loading and stowing it. Defendant claimed that the delivery, a delay in which, under the charter party, authorized a charge for demurrage, was simply delivery alongside and did not include loading and stowing. *Held*, untenable; that the delivery referred to was the complete and final delivery to the vessel, and this did not occur until the lumber was loaded and stowed and so passed out of the custody and control of the charterer. *Baldwin v. S. T. Co.* 279

2. After demurrage begins to run, under and pursuant to the terms of a charter party, Sundays are not to be deducted. *Id.*
3. While a consignee, by simply accepting the goods consigned to him, and in the absence of any provision in the bill of lading providing for the payment of demurrage by him, is not liable therefor, where he is owner of the cargo, and the vessel is through his fault detained an unreasonable length of time at the port of discharge, he is liable for damages in the nature of demurrage. *Dayton v. Parke.* 391

DEPOSITION.

The amendment of the section of the Code of Civil Procedure in reference to the form of the order for taking the deposition of a party or witness before trial (§ 878) made in 1893 (Chap. 721, Laws of 1893), which, after providing that "In every action brought to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons," also provides that "Where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination shall

be made," does not violate any of the express or implied restraints upon the legislative power to be found in the Federal or State Constitution. Such amendment, however, does not authorize an order directing a physical examination apart from or independent of an examination of plaintiff as a witness before trial. *Lyon v. Manhattan R. Co.* 298

DISTRIBUTION.

The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result. *Stokes v. Weston.* 433

EASEMENTS.

1. The interest which a railroad company acquires in land condemned for the use of its road is a permanent easement, and while it exists the company is entitled to the exclusive use, possession and control of the land. *Roby v. N. Y. C. & H. R. R. Co.* 176
2. While the easement may be abandoned, and the owner of the fee again become entitled to the possession, this must be done by unequivocal acts showing clearly such to be the intent, or by a non-user continued for a long time. *Id.*
3. The mere use of the easement for a purpose not authorized, its excessive use or misuse, or a temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. *Id.*
4. A railroad company to whose rights defendant has succeeded acquired by condemnation proceedings the use of a strip of land, and tracks were laid thereon. In an action by plaintiff, who has succeeded to the rights of the original owner, to recover possession, these facts appeared: In 1889 defendant leased the land to Y. for a term of fifteen years. The lease provided that the land was only to be used for a coal yard

and trestle for receiving and handling coal transported over defendant's road. A right was reserved to terminate the lease at any time upon giving six months' notice, and defendant reserved "the use and control of the said track and trestle for all the purposes of a railroad, together with the strip of land." Y. went into possession, built the trestle with coal bins beneath, and since then has had the exclusive use and control of the land for his coal business, and no one else except defendant's agents and employees, and persons having business with Y. could have access thereto. The only use defendant thereafter made of the land and track was to deliver coal to Y. *Held*, the evidence failed to show an abandonment and consequent loss of defendant's easement; and so, that a verdict and judgment in favor of plaintiffs were error. *Id.*

5. Also *held*, that a modification of the judgment, so as to make it subject to the proper easement of defendant, instead of a reversal, was not proper, as Y. was not a party and had not been heard. *Id.*

EJECTMENT.

1. In an action of ejectment plaintiff claimed title under a deed to it from O. of the lot in question, which was part of a tract of land then owned by O.; after his death his son, his only heir at law, conveyed to H., under whom defendant claimed the tract; the deed reserved from the grant the lot conveyed to plaintiff. At the time of the conveyance to H. there was a fence around plaintiff's lot which had been built ten years previously. *Held*, that as the deed to H. recognized the title of plaintiff, and as its lot was practically located and identified, no one claiming under said deed could dispute such title. *Second M. E. Church v. Humphrey.* 187

2. In an action of ejectment plaintiff claimed title under a deed from W. Defendants were in possession, claiming as heirs at law of W.; the latter continued in pos-

session after the conveyance to plaintiff. Defendants offered to prove on the trial the declarations of W., made to third persons after his conveyance to plaintiff and when he was in possession, to the effect that his intent was not to make an absolute conveyance to plaintiff, but he had divested himself of title to avoid threatening embarrassments of litigation. *Held*, that such declarations were inadmissible, and so were properly rejected. *Williams v. Williams.* 156

3. Prior to 1782 the heirs of J. who, as such, were tenants in common of a farm, which was within the corporate limits of the city of New York, entered into an agreement for the purpose of partitioning the same, pursuant to which the farm was divided into parcels, one of which contained a family burying ground lot. One parcel was allotted to each of the tenants in common, and partition deeds were executed. The agreement provided that the burying ground lot should remain and continue the family burying ground, and whoever of the tenants in common should take the parcel containing the same, and should thereafter sell, should reserve said lot in the deed to the purchaser for the purpose specified, "with full liberty to pass and repass as occasion shall require." In 1783 M., one of the tenants in common to whom said parcel was allotted, conveyed the same by deed to another party to the agreement, which deed contained a clause "saving, excepting and reserving" to the heirs of J. the burying ground lot, "with free ingress, egress and regress into, out of and from the same, to bury the dead, etc., forever." No burials were made in the lot after 1840. Said parcel remained intact until 1885, when it was divided, and immediately thereafter the owner of the portion containing the burying ground took possession, removed the remains of the dead buried there, and proceeded to erect a building. In 1889 the heirs of M. conveyed to plaintiff all their right, title and interest in and to the lands of which J. died seized. In an action of ejectment

to recover said burying ground lot, *held*, that M. intended to and did convey the fee of the parcel allotted to him subject only to an easement in said lot for burial purposes; that, therefore, plaintiff failed to show a legal title, and was not entitled to recover. *Blackman v. Striker*. 555

ELECTION (OF OFFICERS).

1. Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of nominations for offices to be filled at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city, in making the selection the board acts judicially, and its action may be reviewed by certiorari. *People ex rel. v. Martin*. 228

2. In proceedings by certiorari to review the action of said board in making such a selection, these facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator with a request that *The World*, the newspaper published by it, should be selected, which affidavit stated that the circulation of said newspaper exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners in substantiation of its claims. No other communication was had between the relator and the board until after the selection was made. Thereafter relator presented to the board an affidavit to the effect that the circulation of *The World* in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claim; this request the board denied, and refused to re-consider the decision made. In their return to the writ the police commissioners alleged that in making the designation they selected the news-

papers which, according to the best information they could obtain, had the largest circulation within the city. *Held*, there was nothing in the record showing that the determination of the board was erroneous, as at the time of the designation it had been furnished with no evidence that *The World* had a larger circulation in the city than any other newspaper; that its circulation might be larger in the country, as stated in the first affidavit, but not as large in the city, and the second affidavit and offer came too late; that the court was bound to take the return as true, and it showed a full compliance with the statute. *Id.*

3. *It seems*, if the return is evasive or not sufficiently full, the relator could have compelled a further return (Code Civ. Pro. § 2185), but having elected to stand upon the return as made it was to be taken as true. *Id.*

— *As to publication of lists of nominations for offices in the city of New York under Election Law* (§ 61, chap. 680, Laws of 1892).

See People ex rel. v. Martin. 228

EMINENT DOMAIN.

1. An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track of the road, does not deprive the owner of his right to compel the railroad company to construct suitable crossings. It is to be assumed that both parties stood upon their legal rights as to crossings, and they are in no manner extinguished or affected by the award. *Beardsley v. Lehigh Valley R. R. Co.* 173
2. Accordingly *held*, that an award in such proceedings, in the absence of evidence showing that the damages awarded rested to any extent upon the form or manner of constructing the crossing, was no defense to an action brought to compel defendant to construct an underground crossing. *Id.*
3. The interest which a railroad company acquires in land condemned for the use of its road is a perma-

nent easement, and while it exists the company is entitled to the exclusive use, possession and control of the land. *Roby v. N. Y. C. & H. R. R. Co.* 178

4. While the easement may be abandoned, and the owner of the fee again become entitled to the possession, this must be done by unequivocal acts showing clearly such to be the intent, or by a non-user continued for a long time. *Id.*
5. The mere use of the easement for a purpose not authorized, its excessive use or misuse, or a temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. *Id.*
6. When land is acquired by the city of New York for street purposes, all pre-existing titles and interests become extinguished, the award of the commissioners of estimate and assessment standing as a substitute for the land taken, and when the lands taken are mortgaged, the mortgagee is entitled to have the award applied upon his mortgage to the extent necessary for his protection. *Gates v. De La Mare.* 307
7. In June, 1888, commissioners of estimate and assessment were appointed to acquire title to lands in the city of New York for a street that was laid out through the lands of D., which were then covered by a mortgage. In November, 1888, D. entered into an agreement with defendant, an attorney, authorizing the latter to take proceedings to have any award made to D. for the land taken for the street increased, and agreeing to pay him for his services one-fourth of any increase. In February, 1890, the commissioners made their preliminary report making an award for the land taken. Defendant thereupon appeared before the commissioners, and, by his efforts, the award was increased \$3,484. The final report of the commissioners was confirmed May 1, 1891. After the date of the first report, but before its confirmation, an action was commenced to foreclose the mortgage; the city was not made

a party. In March, 1891, judgment of foreclosure and sale was entered; in April the whole of the mortgaged premises were sold pursuant to the judgment, and a deed was executed to the purchaser May 25, 1891. In an action to determine who was entitled to the award, upon which defendant claimed a lien under said agreement, *held*, that the mortgage was the paramount lien; that the mortgagee, not having been a party to the agreement with defendant, was not bound thereby; that as the sale was before the confirmation of the commissioners' report, and so before the city acquired title (§ 900, chap. 410, Laws of 1882), the purchaser by his deed took title to all the mortgaged premises, and as when the city acquired title the award stood as a substitute for so much of the land purchased as was taken by the city, the purchaser's deed operated to carry the award, and although this was increased by defendant's services, the purchaser was entitled to the whole thereof. *Id.*

EQUITY.

1. An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee. *Rapps v. Gottleib.* 164
2. The distinction pointed out between such a case and one relating to the transfer of conceded existing legal rights, wherein questions arise as to equities, not between the original parties, but between subsequent holders; as in the cases of *McNeil v. Tenth Nat. Bank* (46 N. Y. 325); *Moore v. Met. Bank* (55 id. 41). *Id.*
3. While a court of equity may have jurisdiction of an action, brought by a principal against his agent, for an accounting as to property intrusted to defendant as agent, this does not make the action necessarily referable. *Empire State T. & T. Co. v. Bickford.* 224
4. The complaint herein asked that defendant account as to his trans-

actions as agent for plaintiff in respect to these items: (1) Receipts and disbursements of plaintiff's moneys; (2) the conversion of personal property belonging to plaintiff and intrusted to defendant; (3) revenue lost to plaintiff by reason of defendant's neglect of his duties, and his attempt to establish a competing business; (4) the proportion of the cost of equipment by plaintiff of a new place of business rendered necessary by defendant's wrongful acts and omissions. An order of reference was granted on motion of plaintiff. *Held*, error; that the first item was the proper subject of an accounting; that while the second might also be, it was not necessarily referable; that the other two items were not matters of account or of equitable cognizance; that the action should be treated as a whole, and so considered was an action at law and not one in equity. *Id.*

See LIMITATIONS (STATUTE OF).

ESTOPPEL.

The parties, who were engaged in and were competitors in the business of water transportation, entered into an agreement to combine their interests. This provided that a corporation should be organized, each to contribute thereto an equal amount of capital in the vessels and properties then employed by them, defendants to have the management of the business and to receive commissions for its performance. In consideration thereof defendants guaranteed to plaintiff a dividend of not less than seven per cent per annum on his shares for seven years. Dividends when earned were to be declared and paid quarterly, and during the seven years neither party was to be interested in any competing steam water line without the consent of the other. The corporation was organized and the business carried on by it for about five years, when, by the judgment in an action brought by the attorney-general in the name of the People, the corporation was dissolved and a receiver appointed. In an action to recover the amount

so guaranteed for the two years subsequent to the dissolution, it was claimed by plaintiff that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and so, they were estopped from interposing it as a defense. The grounds of forfeiture upon which the judgment in the People's action was based were technical violations of the statute under which the corporation was organized, not affecting any public interests, and for some of them plaintiff was as much responsible as defendants. The action was brought upon the application of plaintiff; he gave the bond required by the attorney-general as security for costs, and also verified the complaint. *Held*, that plaintiff owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment of dissolution proceeded; that as between the parties themselves there was no cause for dissolution; and, as plaintiffs procured the judgment, that defendants were not precluded from availing themselves of it as a defense. *Lorillard v. Clyde.* 456

— *When in action on policy of life insurance plaintiff not estopped by statements in proofs of death.*

See *Spencer v. C. M. L. Ins. Assn.* 505

EVIDENCE.

1. Plaintiff, an employee in defendant's machine shop, was injured by the breaking of a belt used to move machinery. The belt was fastened at a splice with a belt fastener which gave way. In an action to recover damages it appeared that there were several kinds of fasteners in use, all of them liable to break under some unusual strain, and no one could foresee when they would break. Plaintiff was permitted, under objection and exception, to ask several of his witnesses their opinion as to the safety of the fastener used. *Held*, error. *Harley v. Buffalo C. M. Co.* 81
2. In an action to recover possession of a manuscript catalogue of

stars, which was made by defendant and his two sisters working to aid him at his request, and was written upon paper purchased and prepared by him, P., the original plaintiff, claimed title on the ground that the work was done for him, by defendant as his servant. This was denied by defendant. P. was director of an observatory, and defendant was his assistant. On the trial defendant testified that in 1885 he, in the presence and hearing of P., showed the catalogue to H., stating that it was his (defendant's) work, and he had done it at the suggestion of P. that he should do some special work as his own. H., as a witness for defendant, corroborated his testimony as to the conversation. P. was thereafter permitted, under objection and exception, to show that at a meeting of the Academy of Science in 1886, at which H. was present, he read a paper entitled "Catalogue of Stars," and was also permitted to read certain letters written to him in 1886 by H. referring to his catalogue of stars. These letters were objected to on the ground that the attention of H. when a witness had not been called to them. *Held*, that the reception of the evidence was error. *Root v. Borst.* 62

3. In an action to recover damages for injuries to plaintiff's dwelling, alleged to have been caused by negligent blasting in excavating on defendant's adjoining premises, the answer was a general denial, save as to the ownership of defendant's premises. On the trial defendant was permitted to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation. *Held*, no error; that the action was not for a trespass or the creating of a nuisance, but for negligence; that defendant was entitled under the answer to show that the act of negligence complained of was not his but that of another, and if done by an independent contractor he was not liable. *Roemer v. Striker.* 134

4. In an action by the executors of a deceased wife against the husband to recover for the conver-

sion of certain bonds alleged to belong to the decedent's estate, defendant claimed title; he offered in evidence reciprocal wills executed by his wife and himself some years prior to that of which plaintiffs were the executors. It was not claimed that either of said wills existed or were in force at the time of the wife's death, and neither referred to the bonds in question. *Held*, that said wills were properly excluded. *Martin v. Hillen.* 140

5. Under the provision of the Code of Civil Procedure (§ 829) prohibiting a party to an action from testifying in his own behalf against the executor or administrator of a deceased person, as to a personal transaction or communication with the deceased, except when the executor or administrator has testified in his own behalf in reference thereto, the exception is confined strictly to the transaction testified to by the personal representative; the party may not be permitted to testify to another and independent personal transaction, for the purpose of explaining, impairing or contradicting the testimony so given. *Id.*
6. In an action of ejectment plaintiff claimed title under a deed from W. Defendants were in possession claiming as heirs at law of W.; the latter continued in possession after the conveyance to plaintiff. Defendants offered to prove on the trial the declarations of W., made to third persons after his conveyance to plaintiff and when he was in possession, to the effect that his intent was not to make an absolute conveyance to plaintiff, but he had divested himself of title to avoid threatening embarrassments of litigation. *Held*, that such declarations were inadmissible, and so were properly rejected. *Williams v. Williams.* 156
7. Defendant executed to plaintiff a guaranty of the payment by W., a plumber, "for any and all materials which they may deliver" to him; defendant, however, "not to be liable for any balance exceeding five hundred

dollars which may become due." In an action upon the guaranty, *held*, that its language was so clear and unambiguous as to furnish conclusive evidence of its meaning; that it was a continuing guaranty, limited to a balance "which may become due," not exceeding the sum specified, but it did not undertake to regulate the amount of W. a future transactions with plaintiff; and so, that the receipt of evidence and a finding to the effect that the instrument was not intended as a continuing guaranty, other than for goods sold to be used in the performance of a certain contract, were errors. *McShane Co. v. Padian*. 207

8. In an action upon a contract executed under seal, but which does not require a seal for its validity, it is competent for defendant to show that the instrument was executed upon condition that it was not to operate as a contract until the performance by plaintiff of some prescribed act, and this may be shown by oral evidence. *Blewitt v. Boorum*. 357

9. Where hearsay evidence only is given of a fact at issue in an action, it will not be regarded as sufficient proof of the fact unless it appears from the course of the trial that it was so received and accepted. *Dayton v. Parke*. 391

10. In an action of replevin, where plaintiff sought to recover goods sold on the ground that the sale was induced by fraudulent representations on the part of the purchasers, similar representations made by them to a commercial agency, concurrently with the sale in question, upon the strength of which other merchants, who were subscribers to the agency, also sold goods to the same purchasers, were offered and received in evidence upon the question of fraudulent intent. *Held*, no error. *Bliss v. Sickles*. 647

EXAMINATION OF PARTY BEFORE TRIAL.

1. The amendment of the section of the Code of Civil Procedure in
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reference to the form of the order for taking the deposition of a party or witness before trial (§ 873) made in 1898 (Chap. 721, Laws of 1898), which, after providing that "In every action brought to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons," also provides that "Where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination shall be made," does not violate any of the express or implied restraints upon the legislative power to be found in the Federal or State Constitution. *Lyon v. Manhattan R. Co.* 298

2. Such amendment, however, does not authorize an order directing a physical examination apart from or independent of an examination of plaintiff as a witness before trial. *Id.*

EXECUTION.

The lessee of certain farm lands executed a chattel mortgage by its terms covering, among other things, all the potatoes and beans "which are now * * * planted or which are hereafter * * * planted during the next year." The greater part of the planting of potatoes and all that of the beans was done after the delivery of the mortgage. After the planting the growing crops were levied upon and sold under an execution against the lessee, and plaintiff became the purchaser. The mortgagor subsequently foreclosed his mortgage and sold said crops to defendant, who took possession. In an action to recover possession, *held*, that the levy by the sheriff operated to transfer to him possession of the crops; that in the absence of proof of any act by the parties to the mortgage to create an actual lien, as against such possession, the equities of the

mortgagee were ineffectual for any purpose; and that plaintiff was entitled to the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage. *R. D. Co. v. Rusey*. 570

EXECUTORS AND ADMINISTRATORS.

1. The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. In an action to compel specific performance of the contract, *held*, that the power of sale was not given for the benefit of the remaindermen simply, but its chief purpose was the benefit and safety of the life tenant; and so, that the power was not extinguished by the death of M. and the deed of the executrix was sufficient to carry the fee. *Cotton v. Burkelman*. 160
2. The cause of action given by the statute (Code Civ. Pro. §§ 1902-1905) to the executors or administrators of a deceased person, to recover damages for negligence causing his death, is no part of the assets of his estate; it is not subject to the payment of his debts or to the ordinary rules applicable to the settlement and administration of the estates of deceased persons. *Stuber v. McEntee*. 200
3. The claim cannot be barred or released before suit except by some person who has at the time authority to bring the action. *Id.*
4. In an action under the statute it appeared that defendant paid to one of the plaintiffs before his appointment as administrator a sum of money, he giving a receipt therefor which stated that the payment was for all expenses caused by the death, and that he had no further claim against defendant. *Held*, that the receipt was not a settlement of the claim or a bar to the action. *Id.*
5. *It seems* that in such case defendant would be entitled to show that the money paid was used to pay the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in estimating the damages. *Id.*
6. Before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifest. *Forster v. Winfield*. 327
7. The will of F. empowered his executors, two in number, to sell any of the real estate of which he died seized, and out of the proceeds "which they are to receive as trustees and in trust to pay any debts;" the net residue after payment of all debts he gave to the "executors and the survivor of them as joint tenants." Then followed this clause: "I have entire confidence that they will make such disposition of such residue as under the circumstances, were I alive and to be consulted, they know would meet my approval." But one of the executors qualified; they both as individuals contracted to sell to defendant a portion of the lands of which the testator died seized. *Held*, that plaintiffs did not take title to the real estate as individuals, and as such could not convey title; and so, that defendant was entitled to judgment for a return of the deposit made by him on execution of the contract and a cancellation of the contract. *Id.*
8. An administrator, as such, has no authority or control over the real estate of his intestate, and assumes no obligation in reference to it. *In re Monroe*. 484
9. He is not, therefore, precluded from foreclosing a mortgage on

said real estate held by him, purchasing on a foreclosure sale and holding the land in his own right.

Id.

10. In proceedings in a Surrogate's Court to remove an administrator, it is the duty of the surrogate to make specific findings of the facts upon which his decree is based; and the duty may not be imposed upon an appellate court of searching the record for facts that should be incorporated in the findings.

Id.

11. In such proceedings it was charged, and the surrogate found in substance, that the administrator at the time of the death of his intestate, owned certain mortgages covering the real estate of the latter; these he foreclosed after he entered upon the discharge of his duties, and at the sale prevented bidding by promising the creditors that he would bid in the property for the amount of his respective liens, make a private sale thereof and account to the estate for any profits realized; that he did bid in the property, made subsequent private sales, realizing profits for which he refused to account. *Held*, that the Surrogate's Court had no jurisdiction to try those questions; that if the executor was liable to account for the profits a court of equity was alone competent to try the issues presented, and render a binding decree.

Id.

12. As to whether it was competent for the surrogate to receive the testimony on the theory that the acts of the administrator were hostile to the estate and so he was unfit to continue in office, *quære*.

Id.

18. Aside from the statute providing for the sale of real estate of which a person died seized, for the payment of his debts, there is no general power in the court to direct a sale for that purpose, or to direct the proceeds of a sale made by order of the court for other purposes to be applied in such payment. *Long v. Long*.

545

14. When resort to the real estate of a decedent for the payment of his

debts is sought by his creditors, the prescribed statutory proceedings must be strictly pursued. *Id.*

15. *It seems*, that when real estate devised or descended is sought to be charged with the debts of the deceased, the validity and existence of the debt is open to contest by the devisees or heirs; they are not concluded by a decree of the surrogate on the accounting of the personal representatives, and except in case of a judgment on the merits, such a decree is not even *prima facie* evidence against them.

Id.

16. The provisions of the Code of Civil Procedure (§ 2606) in reference to an accounting by an executor, or administrator of a deceased executor, administrator or testamentary trustee, as to the trust property, do not apply to a special guardian appointed in proceedings for the sale of the real estate of infants.

Id.

FALSE IMPRISONMENT.

In an action for false imprisonment plaintiff's testimony was to the following effect: Having a valid claim against defendant she went to his place of business to collect it and asked payment of him. Defendant's father, D., who was a stranger to plaintiff, interposed and addressed her on the subject of the bill. She replied she was not addressing him, but the one who owed the bill. She again asked defendant to pay; he said nothing. Plaintiff then added, "Well, the only thing I can do is to state the case to the 'World' and see what they can do for me." Thereupon defendant called to D. and whispered to him. The latter directed a person in the office to go for a detective. An officer came and D. directed him to arrest plaintiff, charging her with blackmail, alleging she had come to extort money from him. This plaintiff denied, but she was arrested and taken to a station house where D. preferred a charge against her of blackmail. She was confined over night, and the next day the charge was changed to that of

disorderly conduct. She was fined, and on payment of the fine was discharged. Prior to this plaintiff had written to defendant; he came to her house with an officer and said to her if she "bothered him about any bill he would make it pretty hot for her." *Held*, that a jury might have found from the testimony that the act of D. was instigated by defendant, and so, that a non-suit was error. *Carson v. Dessau*. 445

FORECLOSURE.

1. The holder of bonds issued by a corporation, secured by a trust mortgage, are the real parties in interest, and when any emergency happens which makes a demand upon the trustee to foreclose the mortgage futile, and leaves the right of a bondholder, without other reasonable means of redress, this authorizes his appearance as plaintiff in an action to foreclose. *Eitlinger v. P. R. & C. Co.* 189
2. Plaintiff was one of two bondholders protected by a trust mortgage. In an action to foreclose the mortgage the complaint set forth the requisite facts to justify a foreclosure, and also alleged that the trustee had left this country, was living abroad and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had departed to join him abroad, and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The complaint was dismissed on the ground that plaintiff could not maintain the action where there was a competent trustee unless he refused to act, and if he had become incompetent it was necessary first to procure the appointment of a new trustee. *Held*, untenable; and that the facts proved justified the bringing of the action by plaintiff. *Id.*
3. An administrator, as such, has no authority or control over the real estate of his intestate, and assumes no obligation in reference to it, and so he is not precluded from fore-

closing a mortgage on said real estate held by him, purchasing on a foreclosure sale and holding the land in his own right. *In re Monroe*. 484

See MORTGAGE.

FOREIGN LAWS.

The provision of the statute of New Jersey in relation to brokers selling real estate, which prohibits them from claiming commissions unless their authority to sell is in writing, applies only to brokers who are themselves authorized to make a sale; it does not apply to one given no authority to fix the price or terms of sale, but who is simply employed to find and bring a possible purchaser to the vendor and is to receive compensation in case a sale is effected. *Knauss v. Krueger Brewing Co.* 70

FORGERY.

1. To sustain a conviction for forgery under the provision of the Penal Code (§ 521) which declares a person to be guilty of that offense "who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true" an "instrument or writing," the forgery or altering of which is forgery, it must appear that the writing or instrument was forged, or was altered after its execution. The provision has no application to a writing the signature to which is genuine and no change in which is shown to have been made after its execution, although it appears it was executed by the party signing it under a mistake or in ignorance of its contents, induced by fraud or deceit on the part of the defendant. *People v. Underhill*. 38
3. The same rule applies to the provisions of said Code declaring an officer of a corporation "who falsifies or unlawfully or corruptly alters" any "writing belonging to or appertaining to the business of the corporation" (§ 514), or any person who, with intent to defraud or to conceal any larceny or misappropriation, alters any writing belong-

ing to the business of a corporation, to be guilty of forgery. *Id.*

8. Upon the trial of an indictment for forgery it appeared that defendant, who was president of a life insurance association, with another person employed by it to adjust losses, settled a claim against it for \$400. The claimant was induced by fraud to sign a written instrument releasing his claim, in which the sum paid was stated to be \$1,400, he supposing the sum stated therein to be that paid. Defendant drew \$1,400 from the treasury of the association and either he or his associate retained and fraudulently appropriated \$1,000 thereof. The release was sent to the office of the company and treated as a record of settlement of the claim for \$1,400 and a voucher for the disbursement of that sum. Defendant was convicted of forgery in the third degree. *Held*, error; that the offense committed by him was not forgery. *Id.*

FORMER ADJUDICATION.

It seems, that when real estate devised or descended is sought to be charged with the debts of the deceased, the validity and existence of the debt is open to contest by the devisees or heirs; they are not concluded by a decree of the surrogate on the accounting of the personal representatives, and except in case of a judgment on the merits, such a decree is not even *prima facie* evidence against them. *Long v. Long*. 545

— Upon reversal of a judgment here a second trial was had and judgment rendered in accordance with decision on reversal; upon a second appeal, *held*, that this court would consider simply whether substantially the same evidence was presented, and so holding, judgment affirmed.

See *White v. Wood* (Mem.). 656

FRAUD.

1. Where a creditor signs a composition agreement, under a secret agreement with the debtor, giving him a preference or some undue

advantage over other creditors, this does not, as to such creditor, vitiate the composition agreement. The two agreements are to be considered as separate and independent, and, while the secret agreement is fraudulent and void, the composition agreement remains valid and enforceable. *Hanover N. Bank v. Blake*. 404

2. *It seems*, that while in case of a secret executed agreement giving a preference to one of the creditors signing a composition agreement the innocent creditors may elect to refuse to be bound by that agreement, if the secret agreement is executory they may not so elect. *Id.*

FRAUDULENT CONVEYANCES.

1. The right of a creditor to bring an action to set aside a fraudulent transfer of property made by his debtor, does not accrue until the recovery of a judgment against the debtor and the return of an execution thereon unsatisfied. Until that time, therefore, the Statute of Limitations does not begin to run against such a cause of action. (Code Civ. Pro. § 880.) *Weaver v. Haviland*. 584
2. The provision of the Code of Civil Procedure declaring that in "an action to procure a judgment, other than a sum of money, on the ground of fraud * * * the cause of action * * * is not deemed to have accrued until the discovery * * * of the facts constituting the fraud," does not make the time of the discovery of the fraud in such a transfer the time of the accruing of the right of action by the creditor, in a case where the fraud was known before the creditor had established his claim by judgment. It simply provides for a class of cases where the right of action was perfect, but the fraud was not until thereafter discovered. *Id.*

GIFTS.

Before a gift to executors *eo nomine* can be held to vest in them in-

dividually, the intention that it should so vest must be plainly manifest. *Forster v. Winfield*. 327

GRANTOR AND GRANTEE.

One in possession of land merely, without other actual title, has an estate in the land which he may transfer, and in case he conveys with covenant of warranty running to the grantee, his heirs and assigns, he transfers an estate to which his covenant attaches, and it may be enforced by one succeeding to the grantee's title. *Mygatt v. Coe*. 78

GUARANTY.

1. Plaintiff entered into a contract with M. & R. to do the mason work on certain houses to be constructed by them, in pursuance of a contract between them and defendants. Defendants executed a guaranty to plaintiff for the payment of the several sums agreed to be paid to him by M. & R., at the times and in the manner stated. In an action upon the guaranty these facts appeared: Plaintiff performed the contract on his part until he was notified by M. & R. to stop, and further performance was prevented by their failure to furnish timbers, as agreed, so that the work could be carried on. Plaintiff was at all times ready, able and willing to carry on his contract. Defendants had carried out their contract with M. & R., and the discontinuance of the work was not rendered necessary by any failure on their part. Plaintiff had been paid for the work done by him up to the time of the discontinuance, and claimed to recover the balance of the contract price, after deducting therefrom the sums paid, and what it would cost to complete the work. *Held*, untenable; that the guaranty was not of the whole and entire performance by M. & R., but simply of payment of the installments specified in the contract, at certain periods as the work progressed, and when the house arrived at certain stages; and as the conditions under which

the unpaid installments were to become due had not happened, the complaint was properly dismissed. *De Luka v. Goodwin*. 194

2. Defendant executed to plaintiff a guaranty of the payment by W., a plumber, "for any and all materials which they may deliver" to him; defendant, however, "not to be liable for any balance exceeding five hundred dollars which may become due." In an action upon the guaranty, *held*, that its language was so clear and unambiguous as to furnish conclusive evidence of its meaning; that it was a continuing guaranty, limited to a balance "which may become due," not exceeding the sum specified, but it did not undertake to regulate the amount of W.'s future transactions with plaintiff; and so, that the receipt of evidence and a finding to the effect that the instrument was not intended as a continuing guaranty, other than for goods sold to be used in the performance of a certain contract, were errors. *McShane Co. v. Padian*. 207

3. The parties, who were engaged in and were competitors in the business of water transportation, entered into an agreement to combine their interests. This provided that a corporation should be organized, each to contribute thereto an equal amount of capital in the vessels and properties then employed by them, defendants to have the management of the business and to receive commissions for its performance. In consideration thereof defendants guaranteed to plaintiff a dividend of not less than seven per cent per annum on his shares for seven years. Dividends when earned were to be declared and paid quarterly, and during the seven years neither party was to be interested in any competing steam water line without the consent of the other. The corporation was organized and the business carried on by it for about five years, when, by the judgment in an action brought by the attorney-general in the name of the People, the corporation was dissolved and a receiver appointed. In an action to recover the amount

so guaranteed for the two years subsequent to the dissolution, *held*, that the parties contracted upon the assumption of corporate existence during the period covered by the guaranty; that the dissolution took away for the future the whole consideration upon which the guaranty was based, and so relieved the defendants from liability thereon. *Lorillard v. Clyde.* 456

4. It was claimed by plaintiff that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and so, they were estopped from interposing it as a defense. The grounds of forfeiture upon which the judgment in the People's action was based were technical violations of the statute under which the corporation was organized, not affecting any public interests, and for some of them plaintiff was as much responsible as defendants. The action was brought upon the application of plaintiff; he gave the bond required by the attorney-general as security for costs, and also verified the complaint. *Held*, that plaintiff owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment of dissolution proceeded; that as between the parties themselves there was no cause of dissolution; and, as plaintiff procured the judgment, that defendants were not precluded from availing themselves of it as a defense. *Id.*

GUARDIAN AND WARD.

1. The provisions of the Code of Civil Procedure (§ 2606) in reference to an accounting by an executor, or administrator of a deceased executor, administrator or testamentary trustee, as to the trust property, do not apply to a special guardian appointed in proceedings for the sale of the real estate of infants. *Long v. Long.* 545
2. A surrogate has no jurisdiction of proceedings to require such a special guardian to account, but

the power lies in the court from which he derived his appointment. *Id.*

3. While it may be, as a general rule, that a surety upon the official bond of a special guardian, appointed to sell the real estate of an infant, is not liable until the remedies against his principal are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends, the infant will not be compelled to resort to it before bringing suit upon the bond. *Id.*
4. A special guardian appointed to sell certain real estate devised to two infants, subject to a legacy, executed a bond to each infant for the faithful performance of his trust. Defendant was one of the sureties on one of the bonds. The guardian sold the real estate and paid the legacy from the proceeds. Defendant had presented a claim against the estate, which was disputed and referred under the statute, and he had recovered judgment thereon. The special guardian, without any order or direction of the court, paid over to defendant the balance of the purchase money to apply upon this judgment. Said guardian never rendered any account to the court of his proceedings and was never discharged from the trust. He died intestate, as did also the other surety. The estates of both were administered and distributed. Defendant was a son of the decedent and was the devisee of the residuary real estate of the latter, of which there was a large amount. In an action upon said bond, *held*, that the payment so made by the special guardian was unlawful, in violation of his trust, and a breach of the condition of the bond for which the surety was liable; that defendant's judgment was not a lien upon the lands devised to the infants, and was enforceable only in the regular course of administration; that if the personalty was insufficient to pay the debts, after it was exhausted, the residuary real estate

was primarily chargeable, and in the absence of proof or findings showing beyond question that some definite sum of money necessary for the payment of the debts must necessarily become in the end a charge upon the lands devised to the infants, there was no equitable ground for a defense or basis for an allowance to defendant. *Id.*

5. Also *held*, that under the circumstances, an accounting in the court having jurisdiction of the guardianship was not necessary before bringing suit on the bond. *Id.*

6. After the infants became of age they made an indorsement upon the account rendered to the surrogate by their general guardian, in which they expressed themselves satisfied therewith. In said account there was no reference to the fund in question here, and no part of it ever came to the hands of the general guardian. *Held*, that this was not a ratification of the disposition made of said fund; also, that the fact that the infants were represented by special guardian in proceedings for the settlement of the accounts of the administrator of the estate of the special guardian, appointed for the sale of the real estate, did not ratify the misappropriation, it not appearing that said accounts referred to or contained any information as to the disposition made of the purchase money. *Id.*

HIGHWAYS.

1. Although, in the absence of a statute providing for compensation, an abutting owner, whose land is injured by the change of grade of a street lawfully made, is without remedy, where the title of such owner extends to the center of the street, if the municipality illegally and wrongfully excavates or otherwise interferes with the street, it is liable to him for the damages. *Folmes v. City of Amsterdam*, 118

2. When it is necessary in order to effectuate the plain purposes of a

statute, the word "or" may be changed to "and" or "nor." *Id.*

3. Under the provision of the Village Incorporation Act (§ 1, tit. 7, chap. 291, Laws of 1870) constituting the board of trustees of a village its commissioners of highways and giving to the board power to discontinue a street, a resolution of the board discontinuing a street is sufficient for that purpose. The provision of the Revised Statutes (2 R. S. 502, § 2) requiring the certificate of twelve freeholders in order to authorize the discontinuance of a highway by commissioners, does not apply to villages incorporated under said act, and the requirement in the act of a petition of freeholders, applies to the opening or altering of a street, not to the discontinuance thereof. *Excelsior Brick Co. v. Village of Haverstraw*, 146

4. The provision of the Revised Statutes (1 R. S. 520, § 99; amended by chap. 811, Laws of 1861) which declares that a highway that has ceased to be travelled or used as such "for six years shall cease to be such for any purpose," applies to streets in villages incorporated under the general act. *Id.*

5. In an action to restrain defendant, a village incorporated under the general law, from interfering with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, in 1887, after the discontinuance, entered into possession and inclosed the same with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who has since used and occupied the same. *Held*, that as against defendant, plaintiff's possession was a sufficient title to sustain the action. *Id.*

6. Under the act of 1881 (Chap. 700, Laws of 1881) transferring the primary responsibility for injuries

to persons or property resulting from defects in highways from commissioners of highways to the towns, the negligence of the commissioner is still the basis of liability, and a town is now only liable for neglect of its commissioner in a case where he would have been liable had the injury occurred prior to the passage of the act, and where the negligence of the commissioner was such as to render him liable, under the act, to the town for a recovery had against it. To impose the liability it must be shown that the proximate cause of the injury was an omission on the part of the commissioner to use ordinary care under all the circumstances in the performance of his duties, *i. e.*, such care as a reasonable and prudent person would ordinarily have exercised under those circumstances. *Lane v. Town of Hancock*.

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7. In an action against a town to recover damages for the death of plaintiff's intestate, alleged to have been caused by a defect in one of its highways, these facts appeared: There are about 320 miles of road in the town, eighty of which are along dugways and up steep ravines. The road where the accident occurred passes through a mountainous wooded section, used mainly for drawing heavy loads of lumber and wood, and for a distance of five miles but two or three families live upon it. The road was built about twenty years previously and was properly constructed; it ran along the side of a steep hill with a retaining wall along the lower side, and on top of the wall, guards consisting of logs about sixteen inches in diameter were placed. The water from a spring on the hillside above was conducted across the road by means of a waterbar and was discharged over the retaining wall. The road at this point, which was at the foot of the hill, was nearly on a level; it had become filled up to the top of the guard, or nearly so; the roadbed was from twelve to fifteen feet wide, and from the upper to the lower side there was a slope of about eighteen inches.

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The lower wagon track was about four feet from the guards. The road had been in this condition about eight years, and no accident had previously happened. Previous to the accident ice had formed upon the waterbar, and shortly before there had been an extraordinarily severe snow storm. The snow had drifted deeply into the road and was soft from thawing; the lower sleigh track had worn down to a few inches from the guards. The deceased came down the hill on a load of logs on two bobs. The ice and snow caused the rear bob to slide, its lower runner went over the wall, the load was overturned and the deceased killed. *Held*, that the evidence failed to show actionable negligence on the part of the commissioner of highways, and that a refusal to non-suit was error. *Id.*

See BRIDGES.

HUSBAND AND WIFE.

1. In an action by the executors of a deceased wife against the husband to recover for the conversion of certain bonds alleged to belong to the decedent's estate, defendant claimed title; he offered in evidence reciprocal wills executed by his wife and himself some years prior to that of which plaintiffs were the executors. It was not claimed that either of said wills existed or were in force at the time of the wife's death, and neither referred to the bonds in question. *Held*, that said wills were properly excluded. *Martin v. Hillen*. 140
2. A wife, to secure a loan to her husband, executed to defendant a deed of land owned by her, he executing to the husband a lease of the land, by the terms of which he agreed to convey the land to the husband by a "good warranty deed and in fee simple," at any time within two years, upon payment of the sum loaned. In an action to compel the execution of such a deed, *held*, that as the deed to defendant was in effect simply a mortgage, the title of the wife was not diverted, and it would be

inequitable to compel defendant, in an action to which the wife is not a party, to convey the land to the husband by deed of general warranty; that the scope of the agreement was that defendant, upon payment of the loan, would convey his mortgage interest by deed purporting to convey the land; that he ought not to be compelled to convey with warranty broader in scope than the interest he had; and so, that he should only be required to warrant against his own acts. *Shields v. Russell*. 290

INJUNCTION.

1. In an action to restrain defendant, a village incorporated under the general law, from interfering with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, in 1887, after the discontinuance, entered into possession and inclosed the same with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who has since used and occupied the same. *Held*, that as against defendant, plaintiff's possession was a sufficient title to sustain the action. *Excelsior Brick Co. v. Village of Haverstraw*. 146

2. Plaintiff's complaint alleged in substance the formation of an association by plaintiff and the defendants, manufacturers engaged in the same business, under an agreement which provided that the members were to pay into a common fund a certain sum per pound on all their manufactures, to form a guaranty fund and for other purposes; the share of each party in said fund to be forfeited in case of his expulsion, as provided for; that plaintiff had performed the agreement on his part, but that the association had, in violation of the agreement and without giving him a hearing, found him in default in making

payments to said fund, and threatened to expel him. The relief sought was that defendants be restrained from interfering with plaintiff's rights in the association, and from forfeiting its interests in the guaranty fund, etc. The answer denied the alleged unlawful actions on the part of the association, and the evidence was upon the issues so made. Both parties conceded on the trial that the agreement was illegal, because it was a combination to enhance prices, but it did not appear that plaintiff at any time during the trial repudiated or disaffirmed it or claimed to recover back the money paid because of its illegality. *Held*, that the refusal of the trial court to grant plaintiff any relief so far as this action was concerned, because it was proceeding in affirmance, and not in repudiation of the contract, was proper. *P. B. Co. v. K. B. Co.* 425

INSOLVENT CORPORATIONS.

1. The provisions of the National Banking Law (§ 5242), prohibiting transfers or payments by a National bank after the commission of an act of insolvency, or in contemplation thereof, made "with a view to the preference of one creditor to another," was not intended to and does not require that in the distribution of the assets of an insolvent National bank, rights lawfully acquired by a creditor, or superior equities, should be disregarded and annulled, and so, liens, equities or rights arising by express agreement between the bank and one contracting with it, or implied from the nature of the dealings between the parties, or by operation of law prior to insolvency, and not in contemplation thereof, are not invalidated. *Elmira S. Bank v. Davis*. 590
2. It is the voluntary act of the bank in view of insolvency, and with the view of preventing the ratable application of its property which is declared to be null and void. *Id.*
3. Accordingly *held*, that the provisions of the State Banking Law

(§§ 118, 130, chap. 689, Laws of 1892), permitting savings banks to keep a fund on deposit in State or National banks, and providing that in case the bank receiving the deposit becomes insolvent, the savings bank shall have a preference, is not in conflict with the National law; and that a savings bank having deposits with a National bank when the latter became insolvent, was entitled to a preference in payment out of the assets of the insolvent bank in the hands of a receiver, after its circulating notes had been provided for and all the conditions of the National law complied with. *Id.*

INSURANCE (FIRE).

1. A condition in a policy of insurance declaring it to be void in case the interest of the insured be other than unconditional absolute ownership, will not operate to avoid it after a loss, where the company, before issuing the policy, were advised and had knowledge of the fact that the insured was not the sole owner, or that the property was incumbered. The condition does not apply to facts so disclosed. (O'BRIEN, J.; FINCH and PECKHAM, JJ., concurring; EARL and GRAY, JJ., dissenting.) *Forward v. Cent. Ins. Co.* 382
2. A policy issued to plaintiff by defendant, through an agent, contained such a condition, and also provided that no agent of the company should have power to waive any condition, except such as by the terms of the policy were made the subject of agreement, and as to those, only by indorsing the waiver upon and attaching the same to the policy. The agent had power to solicit insurance, collect premiums, issue policies, and to waive conditions as provided in the policy. Plaintiff had, before the policy was issued, executed and delivered to his brother, an instrument in the form of a bill of sale of part of the property insured, which was filed in the town clerk's office. There was no consideration paid for the transfer, which was made in reference to certain litigations pending or

threatened against plaintiff, and was intended to be colorable only. Plaintiff remained in possession, and the transferee never claimed any title to the property or right of possession. The agent was, before the issuing of the policy, notified of the existence of the bill of sale, its character and purpose. In an action upon the policy, *held* (O'BRIEN, J.; FINCH and PECKHAM, JJ., concurring; EARL and GRAY, JJ., dissenting), that defendant was chargeable with the knowledge of the agent, and so the condition was not available as a defense. Also, *held* (GRAY, J., dissenting), that the instrument did not constitute a transfer or incumbrance within the meaning of the policy. *Id.*

INSURANCE (LIFE).

1. Defendant issued a policy of insurance upon the life of plaintiff's husband; it having lapsed because of non-payment of a premium when due, to procure its re-instatement the insured executed and delivered to defendant an application, dated February 13, 1890, containing a guaranty that he was in sound health, that he had not been sick and had not required the services of a physician since the date of the policy. In an action upon the policy the defense was a breach of said warranty. It appeared that plaintiff in August, 1890, delivered to defendant proofs of the death as required by the policy, consisting of verified answers to questions made by plaintiff and the physician who attended the decedent in his last sickness. Both of the affiants stated in substance that the illness of which the insured died began February 6, 1890; he died May seventh of that year. The proofs of loss were presented in August thereafter. Defendant took no action thereon. Subsequently, and before the commencement of the action, supplementary affidavits of plaintiff, the physician and another were served correcting the statement as to when the last illness commenced, stating it to have been February sixteenth, and explaining the mis-

take, and on the trial the affiants were sworn and their evidence tended to confirm the statements in the last affidavits. The only evidence upon which defendant relied to show breach of warranty was the statements in the original affidavits. The court charged that plaintiff was entitled to recover unless defendant satisfied the jury, by a preponderance of evidence, that the insured was not in good health at the time of reinstatement, and refused to charge that the burden was on the plaintiff to show good health at that time. *Held*, no error; that as the defense was an affirmative issue interposed by defendant the burden was upon it to establish the same; that the original affidavits raised no estoppel, but were subject to correction, and so it was for the jury to determine whether the defense was established. *Spencer v. C. M. L. Ins. Assn.* 505

INSURANCE (MARINE).

An Italian bark was chartered at New York to carry a cargo from that city to Rangoon, Burmah. By the terms of the charter party the freight was to be paid on delivery of the cargo at the port of discharge. Plaintiffs insured the cargo. Defendants advanced moneys to the master for necessary disbursements, who gave a draft for the amount, pledging the vessel and freight for its payment. This draft was forwarded to Rangoon for collection. The vessel was wrecked, while upon its voyage, on the coast of Burmah; it was abandoned and plaintiffs paid as for a total loss. Part of the cargo and of the ship's stores and furniture was saved, and the salvor filed a petition for salvage in a court of Rangoon of vice admiralty jurisdiction. Defendants' agent also filed a petition in the same court, setting forth the facts and praying for an order of arrest and sale of the ship, cargo, etc. An order of arrest and of sale of the property salvaged was granted, the proceeds to be brought into court, "reserving all questions as to the rights to salvage and of the rights of the parties to the suit." *Sale*

was made and the proceeds deposited in court. Two orders were subsequently made by the court, one in the proceedings first mentioned, decreeing that the salvor was entitled to a sum stated; the other in the second proceeding, decreeing payment of the balance of the proceeds of sale of cargo upon defendant's claim, and payment was so made. In an action to recover of defendants the portion of the proceeds so paid to them, *held*, that while said court had jurisdiction to seize, to order a sale and payment of salvage, its decree summarily disposing of the surplus was not conclusive against plaintiffs, who were not parties to the proceedings and had no opportunity to be heard; that the effect of the sale was simply to discharge all liens on the property and to transfer them to the proceeds; that the power of the court to act summarily against adverse parties, without notice, was limited to the seizure and sale and the award of salvage, and thereafter, although having possession of and jurisdiction over the surplus, it was bound to proceed in some regular way and upon some notice to determine who was entitled thereto; that, subject to the claim for salvage, the proceeds of the sale of vessel and cargo belonged to the owners and could not be disposed of on petition of a claimant, without notice to them, giving them a day in court; that defendants had no lien upon the proceeds of the sale of the cargo, as the contract of affreightment was not performed and no freight was earned; and that as plaintiffs, by the abandonment and payment as for a total loss, succeeded to all the rights of the owners of the cargo, they were entitled to the surplus so paid over to defendants. *China M. Ins. Co. v. Force.* 90

JOINT ADVENTURE.

1. Plaintiff and defendants, as subcontractors, furnished material and labor in the construction of a building and filed liens therefor; the contractor having failed and abandoned the contract, and the owner having advertised for bids

for the completion of the work, they agreed that they would each put in bids. Plaintiff's bid was accepted, and the parties thereupon entered into a contract, pursuant to the terms of which a committee of their number was selected with power to carry on the work, make all necessary contracts for labor and materials, and certain of the defendants became plaintiff's bondsmen. To these bondsmen plaintiff assigned his interest in the payments, which was to be used in defraying the expenses of performance, and it was agreed that out of the payments should first be paid all just claims for material and labor, and if any surplus remained it was to be equally divided among the parties, except that plaintiff was to receive as his share ten per cent of the actual cost of the labor and materials. If a deficiency resulted, the parties agreed "to pay the same in the same proportion as the surplus was to have been divided." The performance of plaintiff's contract with the owner resulted in a loss. In an action upon the contract with defendants, plaintiff claimed that, notwithstanding the loss, he was entitled to the specified percentage. *Held*, untenable; that the enterprise was a joint one and the parties engaged in it occupied in respect to it the relation of co-partners; that only in case of a surplus was plaintiff entitled to anything. *Camp v. Treanor*. 478

2. Plaintiff, under contract with the committee, furnished a portion of the required material and labor. *Held*, that he was entitled to recover a balance unpaid therefor. *Id.*

JUDGES.

1. The provision of the Code of Civil Procedure (§ 46) forbidding a judge from sitting as such in a cause if he is related to any party to the controversy within the degree specified, applies to all trials, civil and criminal. *People v. Connor*. 130

Where, therefore, defendant was convicted of a crime in a Court of

Sessions, one member of which was related to him within the sixth degree, *held*, that the court was without jurisdiction, the result a mistrial, and no bar to another trial. *Id.*

JUDGMENT.

1. In an action to recover money, brought upon a Michigan judgment, the summons was served out of the State, pursuant to an order of publication, upon defendants who were non-residents. A warrant of attachment was also issued, but no property was levied upon. Defendants entered a general appearance by an attorney, who served a general notice of retainer. An answer was served alleging that neither of the defendants were residents of the state nor had they any property therein, and that the court had no jurisdiction. *Held*, that the appearance and notice gave jurisdiction; and that a personal judgment was properly rendered. *Reed v. Chilson*. 152
2. The answer also set up a former judgment against defendants, recovered in this state upon the same cause of action. It appeared there was no service of process within the state in the former action, no appearance by defendants and no levy upon property by attachment. *Held*, that the court had no jurisdiction in the former action (Code Civ. Pro. § 1217), and so, the judgment therein was void and not a bar. *Id.*
3. By an interlocutory judgment in an action for partition, which directed a sale of the premises, it was provided that the life estate of defendant M., a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of the sale "a gross sum in satisfaction of said tenancy by the curtesy, to be fixed * * * according to the principles of law applicable to annuities." After entry of said judgment and before a sale M. died. Thereafter, upon motion, the judgment was amended by striking out the provision in reference to said life estate. *Held*, no error; that the death of the life tenant terminated

his interest; this rendered the execution of that part of the judgment directing a sale of that interest impossible, and the proceeds of sale could not equitably be charged with the supposed value of the life which had terminated; and that until a sale the proceedings were incomplete and the right of the life tenant to a share of the proceeds was conditional, not fixed and absolute. *Mingay v. Lackey*. 449

JUDICIAL SALES.

1. Aside from the statute providing for the sale of real estate of which a person died seized, for the payment of his debts, there is no general power in the court to direct a sale for that purpose, or to direct the proceeds of a sale made by order of the court for other purposes to be applied in such payment. *Long v. Long*. 545
2. When resort to the real estate of a decedent for the payment of his debts is sought by his creditors, the prescribed statutory proceedings must be strictly pursued. *Id.*

JURISDICTION.

1. The service of a general notice of retainer and a general appearance in an action by an attorney for a non-resident defendant is equivalent to personal service of the summons and gives the court jurisdiction of the person of such defendant. *Reed v. Chilson*. 152
2. *It seems*, when a non-resident does not intend to submit himself to the jurisdiction of the court, he may either appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to take judgment by default; the question of jurisdiction will be available if he has not waived it by his own act. *Id.*
3. In an action to recover money, brought upon a Michigan judgment, the summons was served out of the state, pursuant to an order of publication, upon defend-

ants who were non-residents. A warrant of attachment was also issued, but no property was levied upon. Defendants entered a general appearance by an attorney, who served a general notice of retainer. An answer was served alleging that neither of the defendants were residents of the state, nor had they any property therein, and that the court had no jurisdiction. *Held*, that the appearance and notice gave jurisdiction; and that a personal judgment was properly rendered. *Id.*

4. The answer also set up a former judgment against defendants, recovered in this state upon the same cause of action. It appeared there was no service of process within the state in the former action, no appearance by defendants and no levy upon property by attachment. *Held*, that the court had no jurisdiction in the former action (Code Civ. Pro. § 1217), and so, the judgment therein was void and not a bar. *Id.*
5. Upon motion to set aside an attachment granted, on the ground that defendant was a non-resident, it appeared that plaintiffs brought the action, as assignees of the claim set forth in the complaint; that their assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, and before the motion costs were paid this action was brought. *Held*, that while plaintiffs' assignors were stayed (Code Civ. Pro. § 779), the stay did not render the present action and the proceedings thereon void, and did not deprive the court of jurisdiction, but only rendered further proceedings irregular; and so did not affect the validity of the attachment; and that it was competent for the court below to deny the motion, in case plaintiffs paid the costs of the former action within twenty days. *Wessels v. Boettcher*. 212
6. The Supreme Court has no power on appeal to add to a judgment a sum which it finds by the evidence to be due plaintiff, where the question as to what amount is due is one of fact, upon which either

- party might demand the verdict of a jury. *Dayton v. Purke*. 391
7. As at the time of the ratification of the judiciary article of the State Constitution, which provides that the Superior Court of New York is continued "with the powers and jurisdiction" it then had (§ 12, art. 6), said court had jurisdiction of an action by a resident of the state, although not a resident of the city, against a foreign corporation to recover damages for personal injuries caused by negligence (Code Pro. § 427), said court has now jurisdiction of such an action, notwithstanding the provision of the Code of Civil Procedure (sub. 7, § 263) in reference to the jurisdiction of superior city courts. Any legislation attempting to limit the jurisdiction is unconstitutional. *Flynn v. Centl. R. R. Co. of N. J.* 439
 8. Aside from the statute providing for the sale of real estate of which a person died seized, for the payment of his debts, there is no general power in the court to direct a sale for that purpose, or to direct the proceeds of a sale made by order of the court for other purposes to be applied in such payment. *Long v. Long*. 545
 9. A surrogate has no jurisdiction of proceedings to require a special guardian, appointed in proceedings for the sale of the real estate of an infant, to account, but the power lies in the court from which he derived his appointment. *Id.*
 10. The State courts have no jurisdiction of an action for an infringement of a patent, and so, unless there is an agreement on the part of the owner for the manufacture and sale of a patented article, an action is not maintainable in said courts to recover therefor. *Denise v. Sweet*. 602
- KINGS (COUNTY OF).
1. The act of 1891 (Chap. 290, Laws of 1891), which authorizes and empowers the boards of supervisors of the counties of Kings and Queens to build a bridge, at a point specified, over navigable waters dividing the two counties, "or to show cause," etc., is in contravention of the provision of the State Constitution (Art. 18, § 8) prohibiting the state legislature from passing local bills providing for building bridges. *People ex rel. v. Bd. Suprs. Queens Co.* 271
 2. A writ of mandamus having been granted setting aside an apportionment made by the board of supervisors of the county of Kings, and directing a new apportionment, said board re-convened and made such apportionment. On application for an alias writ, it appeared that if the county was so divided that each district would contain the same number of inhabitants, each of the eighteen districts the county was entitled to would containd 54,877 people. Eleven of the districts, as apportioned, contained a population ranging from 53,000 to 58,000; the others contained the following population respectively: 61,263, 60,808, 60,881, 58,550, 50,398, 49,197, 48,944. *Held*, that the deviations were not so great as to justify the interference of the courts; that the apportionment did not, upon the face of the record, indicate such a manifest abuse of discretion as to amount to an evasion or disobedience of the former decision. *In re Baird*. 523
 3. In proceedings by mandamus to compel the board of supervisors of Kings county to re-convene and make a new apportionment of the county into assembly districts on the ground that the apportionment made was not based on the citizen population excluding aliens, but that aliens were included, it appeared that the apportionment first made was set aside in proceedings by mandamus as violative of the Constitution, unequal and vicious, and a new apportionment ordered. In making the original apportionment the same error was made, *i. e.*, including aliens, but no objection was taken on that account in the first proceedings. Another apportionment (the one here complained of) was then made. The proof tended to show that the distribution of aliens through the districts formed was in a propor-

tion varying so little from that of the citizen population that the same apportionment might properly have been made had it been based upon the citizen population alone. *Held*, that under the circumstances and as no appreciable harm had resulted from the error complained of, a second judicial interference was not required. *In re Whitney*. 531

LABOR.

1. The legislature has power to pass a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract. *Clark v. The State*. 101
2. Accordingly *held*, that the act of 1889 (Chap. 380, Laws of 1889), which took effect in June of that year, regulating the wages of day laborers employed by the state or any officer thereof on public works, was constitutional. *Id.*
3. When the compensation of a laborer is so fixed by statute it cannot be reduced by a state officer under whom a laborer is employed, and the fact that he takes for a time a reduced compensation does not estop him from subsequently claiming the residue. *Id.*
4. Upon hearing of a claim presented to the Board of Claims the following facts appeared: Plaintiff was employed by the superintendent of public works as lock tender on the canal during the season of navigation of 1889. No express agreement was made for compensation, but claimant was paid twenty dollars monthly; at no time during his employment did he make any claim that he was entitled to more, but he executed no release. *Held*, that the claimant was a laborer within the meaning of said statute of 1890, and that while if there had been a contract, either express or implied, at the beginning of the claimant's employment, fixing his compensation, the act would have had no application, in the absence of such a stipulation he was entitled to recover the difference be-

tween the sum fixed by the statute, and that paid to him from and after the time it went into effect. *Id.*

LANDLORD AND TENANT.

1. Defendant, being the owner of a store in which he carried on the jewelry business, entered into an agreement with plaintiff, who was engaged in the stationery business, by which the former agreed to furnish for the use of the latter, one show case and suitable shelving in the store "for the purpose of conducting a stationery business," for the term of five years, plaintiff to pay therefor a percentage on the gross amount of his sales. Plaintiff entered the store and carried on the stationery business therein for two years, when defendant removed to a new store, taking away the show case and shelving he had furnished for plaintiff's use, furnishing him no others in their place; he also rented the store, one-half for a second-hand clothing business, the other half for a dyeing establishment. In an action to recover damages, *held*, that the agreement contemplated that the stationery business should become a department in defendant's store, that he could not, after plaintiff had entered upon that business; so change the character of the business carried on, and the arrangements of the store, as to make it unfit and unsuitable for plaintiff's business, and so destroy it; that the facts justified a finding that defendant, by his acts, had ousted plaintiff, broken up his business and violated his agreement; also that the agreement did not create the relation of landlord and tenant, and so the rule of damages proper, where that relation exists, did not apply; but that plaintiff was entitled to recover the value of the agreement to him at the time of the breach. *Dickinson v. Hart*. 183
2. Where one of several houses belonging to the same owner is so constructed as to require the support of the wall of the adjoining house, and the owner leases the

former, the tenant is entitled to that support, and in case the owner or his grantee removes the wall, he is a trespasser and liable to the tenant for his damages. *Snow v. Pulitzer.* 263

8. Where a lessor of premises leased and occupied for business purposes has been evicted and his business broken up by the unlawful acts of his landlord, the prospective profits of his business for the remainder of the term is a proper item of damages. *Id.*

4. The owner of two adjoining buildings in the city of New York leased the first floor of one of them to plaintiff for a term of years for a store. Said owner subsequently sold and conveyed both buildings to defendant, who commenced tearing down the building adjoining plaintiff's; when a portion was removed the wall of plaintiff's building began to crack and break. Proceedings were thereupon taken by the fire department of New York by which plaintiff's building was condemned as unsafe, and its removal was directed. Defendant thereupon tore it down and plaintiff was ousted. In an action to recover damages, it was found that at the time of the lease to plaintiff the building in which his store was located was dependent for support upon the adjoining wall. *Held*, that plaintiff was entitled to that support; that defendant could not lawfully remove the wall and so render the demised premises untenable, and in so doing he was a trespasser; that the fact that defendant when he began to take down the wall was ignorant that the adjoining building was dependent upon it for support did not affect his responsibility; nor was he protected from responsibility by the decision of the fire department, as it was his act that rendered the building unsafe and created the danger. *Id.*

5. It was provided in plaintiff's lease that the store should be exclusively used for the sale of confectionery; he made some expenditures in fitting up the store. At the time he was evicted he was

doing a large and profitable business and had on hand a large stock. The trial court charged the jury, in substance, that in assessing damages they could take into consideration the expenditures so made, the damage to and depreciation of the stock on hand, also the profits he could have made in his business if he had been permitted to carry it on to the end of his lease. *Held*, no error. *Id.*

LAW.

— *When action for an accounting one of law, not equity.*

See E. S. T. & T. Co. v. Bickford. 224

LEASE.

1. A railroad company to whose rights defendant has succeeded acquired by condemnation proceedings the use of a strip of land, and tracks were laid thereon. In an action by plaintiff, who has succeeded to the rights of the original owner, to recover possession, these facts appeared: In 1889 defendant leased the land to Y. for a term of fifteen years. The lease provided that the land was only to be used for a coal yard and trestle for receiving and handling coal transported over defendant's road. A right was reserved to terminate the lease at any time upon giving six months' notice, and defendant reserved "the use and control of the said track and trestle for all the purposes of a railroad, together with the strip of land." Y. went into possession, built the trestle with coal bins beneath, and since then has had the exclusive use and control of the land for his coal business, and no one else except defendant's agents and employees, and persons having business with Y., could have access thereto. The only use defendant thereafter made of the land and track was to deliver coal to Y. *Held*, the evidence failed to show an abandonment and consequent loss of defendant's easement; and so, that a verdict and judgment in favor of plaintiffs were error. *Roby v. N. Y. C. & H. R. R. Co.* 176

2. Also *held*, that a modification of the judgment, so as to make it subject to the proper easement of defendant, instead of a reversal, was not proper, as Y. was not a party and had not been heard. *Id.*

LEGISLATURE.

1. The board of supervisors of a county entitled to more than one member of assembly, in making an apportionment of assembly districts, are entitled to the exercise of a reasonable discretion. *In re Baird.* 528
2. As under the constitutional limitations forbidding the division of towns in making such an apportionment and requiring each district to be of convenient and contiguous territory, absolute equality of population in the districts is not possible, a slight variation will not warrant or justify an application to the courts for redress. To authorize this there must be a grave, palpable and unreasonable deviation, so that when the facts are presented, argument will not be necessary to show that such a deviation has been intentionally made. *Id.*
3. The constitutional prohibition against the division of towns in making the apportionment does not apply to wards of a city. A ward, although treated as a town for some purposes of municipal government, is not a town within the meaning of said prohibition, and so, a ward may be divided. *Id.*
4. A writ of mandamus having been granted setting aside an apportionment made by the board of supervisors of the county of Kings, and directing a new apportionment, said board re-convened and made such apportionment. On application for an alias writ, it appeared that if the county was so divided that each district would contain the same number of inhabitants, each of the eighteen districts the county was entitled to would contain 54,877 people. Eleven of the districts, as apportioned, contained a population ranging from 53,000 to 58,000; the others contained the following population respectively: 61,268, 60,808, 60,381, 58,550, 50,398, 49,197, 48,944. *Held*, that the deviations were not so great as to justify the interference of the courts; that the apportionment did not, upon the face of the record, indicate such a manifest abuse of discretion as to amount to an evasion or disobedience of the former decision. *Id.*
5. The Constitution does not require the districts to be made up of compact territory, and the fact that districts in a city are irregular in form does not establish any actual inconvenience. *Id.*
6. The fact that in making an apportionment of a county into assembly districts it was not based upon the citizen population, but aliens were included, does not necessarily require that the apportionment should be set aside for that error. The court will not presume a material disproportion in the distribution of aliens throughout the county. *In re Whitney.* 531
7. In proceedings by mandamus to compel the board of supervisors of Kings county to re-convene and make a new apportionment of the county into assembly districts on the ground that the apportionment made was not based on the citizen population excluding aliens, but that aliens were included, it appeared that the apportionment first made was set aside in proceedings by mandamus as violative of the Constitution, unequal and vicious, and a new apportionment ordered. In making the original apportionment the same error was made, *i. e.*, including aliens, but no objection was taken on that account in the first proceedings. Another apportionment (the one here complained of) was then made. The proof tended to show that the distribution of aliens through the districts formed was in a proportion varying so little from that of the citizen population that the same apportionment might properly have been made had it been based upon the citizen population alone. *Held*, that under the circumstances and as no

appreciable harm had resulted from the error complained of, a second judicial interference was not required. *Id.*

LIBEL.

In an action for libel the complaint averred that plaintiff was of "good character and repute, and enjoyed the respect of her friends and acquaintances and of the community." This was put in issue by the answer. Testimony was offered by plaintiff on the trial to prove her allegations, which was received under objection and exception. *Held*, that in the absence of any disclaimer on the part of defendant when the objection was raised, of any purpose of questioning plaintiff's reputation, the reception of the testimony was not error; that while it was unnecessary for plaintiff to make the averment, having done so, and defendant having made an issue thereon, this opened the door for the evidence. *Stafford v. M. J. Assn.* 598

LICENSE.

1. One inviting another upon his premises does not thereby become the absolute insurer of the safety of the other except as against his own negligence. *Flynn v. Cent. R. R. Co. of N. J.* 439
2. The owner of premises occupied for business purposes, as a general rule, is simply required to use reasonable prudence and care to keep his property in such a condition that those who go thereon shall not be unreasonably and unnecessarily exposed to danger. *Id.*
3. In 1882 B., the owner of a patent, and plaintiff's assignor, and the firm of S. & S., entered into an agreement by which he gave to the firm a license to manufacture and sell the patented article for one year on payment of specified royalties. By the terms of the agreement the firm had the privilege of renewing the license on giving sixty days' notice. The agreement was renewed until May 1, 1885,

when a new agreement was made renewing it for another year, but any further extension to depend upon the mutual agreement of the parties. Pending negotiations for renewal the firm continued to manufacture the article and paid the agreed royalties up to June 30, 1886. No new agreement was made. B. notified the firm that the license was revoked, and the old agreement was considered by both parties as terminated at that time. The firm, however, thereafter manufactured and sold an article varying in some particulars from the patent, but in substance the same, which it claimed was not an infringement upon the rights secured by the letters patent. In an action to recover royalties for the goods so manufactured, *held*, that the continued manufacture and the failure of B. to take further action to prevent it after said notice, did not amount to a waiver of the notice or a renewal of the license, and so plaintiff was not entitled to recover the agreed royalties; that the only cause of action was for an infringement, of which the state court had no jurisdiction. *Dennis v. Swett.* 602

LIENS.

An Italian bark was chartered at New York to carry a cargo from that city to Rangoon, Burmah. By the terms of the charter party the freight was to be paid on delivery of the cargo at the port of discharge. Plaintiffs insured the cargo. Defendants advanced moneys to the master for necessary disbursements, who gave a draft for the amount, pledging the vessel and freight for its payment. This draft was forwarded to Rangoon for collection. The vessel was wrecked, while upon its voyage, on the coast of Burmah; it was abandoned and plaintiffs paid as for a total loss. Part of the cargo and the ship's stores and furniture was saved, and the salvor filed a petition for salvage in a court of Rangoon of vice admiralty jurisdiction. Defendants' agent also filed a petition in the same court, setting forth the facts and praying for an order of arrest

and sale of the ship, cargo, etc. An order of arrest and of sale of the property salvaged was granted, the proceeds to be brought into court, "reserving all questions as to the rights of salvage and of the rights of the parties to the suit." Sale was made and the proceeds deposited in court. Two orders were subsequently made by the court, one in the proceedings first mentioned, decreeing that the salvor was entitled to a sum stated; the other in the second proceeding, decreeing payment of the balance of the proceeds of sale of cargo upon defendants' claim, and payment was so made. In an action to recover of defendants the portion of proceeds so paid to them, *held*, that while said court had jurisdiction to seize, to order a sale and payment of salvage, its decree summarily disposing of the surplus was not conclusive against plaintiffs, who were not parties to the proceedings and had no opportunity to be heard; that the effect of the sale was simply to discharge all liens on the property and to transfer them to the proceeds; that the power of the court to act summarily against adverse parties, without notice, was limited to the seizure and sale and the award of salvage, and thereafter, although having possession of and jurisdiction over the surplus, it was bound to proceed in some regular way and upon some notice to determine who was entitled thereto; that, subject to the claim for salvage, the proceeds of the sale of vessel and cargo belonged to the owners and could not be disposed of on petition of a claimant, without notice to them, giving them a day in court; that defendants had no lien upon the proceeds of the sale of the cargo, as the contract of affreightment was not performed and no freight was earned; and that as plaintiffs, by the abandonment and payment as for a total loss, succeeded to all the rights of the owners of the cargo, they were entitled to the surplus so paid over to defendants. *China M. Ins. Co. v. Force*.

See CHATTEL MORTGAGE.
MORTGAGE.
PLEDGE.

LIMITATIONS (STATUTE OF).

1. The provision of the Code of Civil Procedure (§ 888) declaring that "an action, the limitation of which is not specially prescribed, * * * must be commenced within ten years after the cause of action accrues," applies to any and every form of equitable action. *Gilmore v. Ham*. 1
2. A right of action in favor of the retiring against the liquidating partner for an accounting does not accrue at the time of the dissolution; nor is it postponed until the last item of partnership business is settled and closed. The liquidator is bound to be diligent, and where there has been a needless delay equity may interfere. *Id*.
3. The right of action, therefore, accrues, and the Statute of Limitations begins to run against it when, under the circumstances of the particular case, the liquidating partner has had a reasonable time within which to perform his duty, and so is in fault for not fully completing it. *Id*.
4. *It seems*, that even in the case of a direct trust, the Statute of Limitations begins to run when the trust ends, and the trustee has no longer a right to hold the trust fund or property, but is bound to pay it over or transfer it, discharged from the trust. *Id*.
5. Where, prior to the dissolution of a partnership by mutual consent, without any agreement for liquidation, one of the partners had, without right as between him and his co-partner, withdrawn a sum of money from the firm, and after the dissolution both acted faithfully in liquidation, upon the completion of which the partner who had made the over-draft refused to account, *held*, that the Statute of Limitations only then began to run against a cause of action in favor of his co-partner for an accounting, at least in the absence of a finding that the former had, prior to that time, refused to apply the over-draft to the purposes of the liquidation. *Gray v. Green*. 316

6. The right of a creditor to bring an action to set aside a fraudulent transfer of property made by his debtor, does not accrue until the recovery of a judgment against the debtor and the return of an execution thereon unsatisfied. Until that time, therefore, the Statute of Limitations does not begin to run against such a cause of action. (Code Civ. Pro. § 380.) *Weaver v. Haviland.* 534

7. The provision of the Code of Civil Procedure declaring that in "an action to procure a judgment, other than a sum of money, on the ground of fraud * * * the cause of action * * * is not deemed to have accrued until the discovery * * * of the facts constituting the fraud," does not make the time of the discovery of the fraud in such a transfer the time of the accruing of the right of action by the creditor, in a case where the fraud was known before the creditor had established his claim by judgment. It simply provides for a class of cases where the right of action was perfect, but the fraud was not until thereafter discovered. *Id.*

8. P. sold and assigned a mortgage on lands in Michigan to F., plaintiff's assignor, for the sum of \$2,600, which sum she falsely represented was due and unpaid thereon, when in fact the amount was but \$2,100. F. brought an action in Michigan against P. to recover back the excess, and recovered judgment. In 1881, and shortly after that recovery, P. transferred her property to defendant, and delivered to him the money received for the assignment, without consideration, and for the purpose of placing her property beyond the reach of creditors. An action was brought here upon the Michigan judgment, and judgment recovered against P. in 1886, upon which execution was issued and returned unsatisfied. In this action, brought within six years thereafter, to set aside the fraudulent transfer to the defendant, *held*, that the action was not barred by the Statute of Limitations; also, that the fact that an action for money had and

received might have been maintained by F. against defendant to recover the amount overpaid, immediately after the money came to his hands, and that this cause of action was barred by the statute, did not affect the result here, as the two causes of action were entirely distinct, and the present one was in no way dependent upon the other. *Id.*

MALICIOUS PROSECUTION.

1. *It seems* that where a party has been subjected to some special or added grievance, by an interference with his person or property in a civil action, brought against him without probable cause, he may maintain an action for malicious prosecution, to recover any legal damages so sustained. *Willard v. H., B. & H.* 492

2. An action for malicious prosecution may, in a proper case, be maintained against a corporation. *Id.*

3. To sustain an action for malicious prosecution in prosecuting a former civil action, the circumstances must appear to have been such that no reasonable man could have been influenced thereby to the belief that the former action was maintainable. *Id.*

4. The question is, not what the actual facts were, but what defendant had reasonable cause to believe they were when instituting the former action, and if, as he so believed, they furnished reasonable cause, the failure of the action is no evidence of want of probable cause or of malice. *Id.*

5. Plaintiff was formerly the treasurer and general manager of defendant, a corporation chartered for the purpose of manufacturing and selling certain metal goods; he was also a stockholder of a company engaged in manufacturing carbons for electric lighting purposes. He executed a contract on the part of defendant with the carbon company, under which the latter was to sell all of its manufactures to defendant. The

carbon company, desiring to increase its facilities, made an arrangement with plaintiff, who undertook to procure the means by lending the defendant's credit. The capital of the carbon company was \$25,000, and at this time it was indebted to defendant over \$22,000. To carry out this arrangement the carbon company made its note payable to defendant's order, which plaintiff indorsed in its name and procured to be discounted. To take up this note the carbon company sent another note, payable to plaintiff, to A., an agent of the latter, who had authority to make and indorse notes in its name, and who was also a stockholder of the carbon company; this he indorsed and procured to be discounted and the proceeds were used to take up the former note. Plaintiff having left defendant's service, its president, in ignorance of the facts, and supposing the last note to be the renewal of a customer's note, to take it up, indorsed and procured the discount of another note, which defendant was obliged to pay. Said president having ascertained the facts, consulted defendant's attorney, and was advised by him that an action to recover damages was maintainable against plaintiff. The latter having refused to secure defendant against loss, its directors directed the prosecution of such an action. The action was brought and an attachment was issued therein. The complaint was dismissed on trial on the ground that as there was no evidence that any of the directors and stockholders of the plaintiff therein (the defendant here) were ignorant of the transactions with the carbon company, it was to be assumed they acquiesced therein. Upon the trial of this action for malicious prosecution it appeared that aside from the plaintiff and A., none of defendant's directors had any knowledge of said transactions until the facts were discovered by the president. *Held*, that as the burden of proving the want of probable cause rested upon plaintiff, this necessitated that he should show that defendant authorized and acquiesced in his mode of corpo-

rate management, and as not only had he failed in this, but the contrary was established, the action was not maintainable. *Id.*

6. To authorize a recovery in an action for malicious prosecution in bringing a civil action, wherein defendant was unsuccessful, clear and satisfactory proof of all the fundamental facts constituting plaintiff's case must be given. Costs awarded to a successful defendant in a civil action are the indemnity which the law gives him for a groundless prosecution, and actions for malicious prosecution based thereon are not to be encouraged. *Ferguson v. Arnov.* 580

7. There was a highway in front of defendant's land which had existed since 1804. In 1888 and 1889 it was four rods wide. The highway commissioner of the town, claiming that, as originally laid out, said road was five rods wide, and that it had been encroached upon by the veranda to defendants' house and by their fences, gave them notice to remove the same, and upon their refusal caused them to be removed. Defendants thereupon commenced an action of trespass against plaintiff and others who assisted in the removal, and obtained an order for plaintiff's arrest therein, under which he was arrested and gave bail. Said action resulted in a verdict and judgment for the defendants therein. In an action for malicious prosecution these facts appeared: Defendants had inherited their land from their father; the veranda and fences as they were when removed were there then and had been there for over forty years; defendants had known the highway for many years, had not themselves encroached, and did not know of any encroachment thereon. No claim of any encroachment was made until about 1888. The highway as then fenced out was of the usual width. There was no record of its laying out, and no recorded survey thereof. There was a record of an alteration thereof in 1804, which recited that it was five rods wide, but this defendants had never seen, and in commencing the action of

trespass they acted under advice of counsel. *Held*, that plaintiff failed to show want of probable cause, and so a refusal to non-suit was error; that while if want of probable cause had been shown the fact that an order of arrest was issued would have had a bearing upon the question of malice, it had no bearing upon that of probable cause. *Id.*

MANDAMUS.

1. The duty imposed by the "County Law" of 1892 (§ 68, chap. 18, Laws of 1892) upon the boards of supervisors of two counties divided by navigable tide waters spanned by a bridge on a highway crossing such waters, to keep the same in repair, is mandatory, not discretionary, and when the reparation requires that the bridge shall be re-built, it is the duty of the two boards to re-build it, and the performance of this duty may be compelled by mandamus. *People ex rel. v. Bd. Suprs. Queens Co.* 271
2. A citizen of one of the counties who is put to inconvenience by reason of the non-repair of the bridge, and so is injured by the inaction of the boards, is entitled to be a relator in proceedings by mandamus to compel the performance of their duty. *Id.*
3. It is the office of a writ of mandamus in such a case to put the boards in motion simply; it is for them to determine the character of the bridge, so only that it meets the public needs. The courts may not control their discretion in this respect, so long as they act in good faith. *Id.*
4. An alternative writ of mandamus is equivalent to a complaint in an action, and a demurrer thereto stands as a demurrer in an ordinary suit. *Id.*
5. Where, therefore, the substantial right is set out in an alternative writ, the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled. *Id.*
6. The court, *it seems*, may, in awarding the peremptory writ, mould it according to the just rights of all the parties. *Id.*
7. The provision of the act of Congress of 1890 (§ 7, chap. 907), prohibiting the construction of such a bridge until its location and plan shall be approved by the secretary of war, does not justify inaction on the part of the boards of supervisors, and, *it seems*, the matter may be provided for in the peremptory writ. *Id.*
8. A writ of mandamus having been granted setting aside an apportionment made by the board of supervisors of the county of Kings, and directing a new apportionment, said board re-convened and made such apportionment. On application for an alias writ, it appeared that if the county was so divided that each district would contain the same number of inhabitants, each of the eighteen districts the county was entitled to would contain 54,877 people. Eleven of the districts, as apportioned, contained a population ranging from 53,000 to 58,000; the others contained the following population respectively: 61,263, 60,808, 60,381, 58,550, 50,893, 49,197, 48,944. *Held*, that the deviations were not so great as to justify the interference of the courts; that the apportionment did not, upon the face of the record, indicate such a manifest abuse of discretion as to amount to an evasion or disobedience of the former decision. *In re Baird.* 523
9. In proceedings by mandamus to compel the board of supervisors of Kings county to re-convene and make a new apportionment of the county into assembly districts on the ground that the apportionment made was not based on the citizen population excluding aliens, but that aliens were included, it appeared that the apportionment first made was set aside in proceedings by mandamus as violative of the Constitution, unequal and vicious, and a new apportionment ordered. In making the original apportionment the same error was made, *i. e.*, including

aliens, but no objection was taken on that account in the first proceedings. Another apportionment (the one here complained of) was then made. The proof tended to show that the distribution of aliens through the districts formed was in a proportion varying so little from that of the citizen population that the same apportionment might properly have been made had it been based upon the citizen population alone. *Held*, that under the circumstances and as no appreciable harm had resulted from the error complained of, a second judicial interference was not required. *In re Whitney*. 581

MASTER AND SERVANT.

1. A master is not bound to furnish the best known appliances for the work in which his servant is employed, but only such as are reasonably fit and safe: he satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if selecting them for his individual use. *Harley v. Buffalo C. M. Co.* 81
2. Where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master may not be made liable where, in selecting the appliance which causes an injury to his servant, he took the one which, according to his judgment and that of skilled men in his employ, was the best. *Id.*
3. It is culpable negligence, not an error of judgment, which imposes the liability. *Id.*
4. Where a master does not require his servant to repair machinery used by the latter, when out of order, but has a machinist employed to perform that duty, to whom the servant is required to report in case the machinery becomes out of order, it is not required of the master to instruct the servant as to the manner of repairing or the danger of attempting it, and in case the serv-

ant does attempt it without orders and is injured, the master is not liable. *McCue v. N. S. M. Co.* 106

5. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, it appeared that defendant was a plumber; the deceased, an apprentice in his employ. The latter was killed by the caving in of the sides of a trench or excavation in which he was engaged in plumbing work. *Held*, that in the absence of other proof or explanation, the inference was reasonable or at least possible, that the trench was the place furnished the servant by defendant in which to do his work, and so a refusal to submit the question to the jury was error. *Stuber v. McEntee*. 200
6. Where a servant is injured by the negligent performance of an act or duty which the master as such is required to perform the latter is liable, although the negligence was that of another servant to whom the performance of the act or duty was intrusted, and this, without regard to the rank or title of the person guilty of the negligence. *Hankins v. N. Y., L. E. & W. R. R. Co.* 416
7. The master is not relieved from liability in such case by the fact that he has promulgated rules or regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter. *Id.*
8. A train dispatcher in ordering the movements of railroad trains, performs a duty resting upon the railroad company, and so as to its employees, his acts are those of the company. *Id.*

MORTGAGE.

1. An assignee of a mortgage takes subject to the equities between the original parties, and has no greater right against the mortgagor than belonged to the mortgagee. *Rapps v. Gottlieb*. 164
2. Where, therefore, a bond and mortgage was executed and delivered to G. upon the express un-

- derstanding that he should advance thereon a sum specified, and that until the advance was made they were to be "invalid, void and of no effect," and G. made no advance, but assigned the instruments to S., who took in good faith and for value, *held*, that the mortgage was invalid in the hands of the assignee; and that an action was maintainable to have the same canceled as a cloud on plaintiffs' title. *Id.*
3. The distinction pointed out between such a case and one relating to the transfer of conceded existing legal rights, wherein questions arise as to equities, not between the original parties, but between subsequent holders; as in the cases of *McNeil v. Tenth Nat. Bank* (48 N. Y. 325); *Moore v. Met. Bank* (55 id. 41). *Id.*
4. A wife, to secure a loan to her husband, executed to defendant a deed of land owned by her, he executing to the husband a lease of the land, by the terms of which he agreed to convey the land to the husband by a "good warranty deed and in fee simple," at any time within two years, upon payment of the sum loaned. In an action to compel the execution of such a deed, *held*, that as the deed to defendant was in effect simply a mortgage, the title of the wife was not diverted, and it would be inequitable to compel defendant, in an action to which the wife is not a party, to convey the land to the husband by deed of general warranty; that the scope of the agreement was that defendant, upon payment of the loan, would convey his mortgage interest by deed purporting to convey the land; that he ought not to be compelled to convey with warranty broader in scope than the interest he had; and so, that he should only be required to warrant against his own acts. *Shield v. Russell*. 290
5. The action was brought by plaintiff as assignee of the rights of the husband; the lease contained a provision making it non-assignable without the consent of defendant; the latter claimed that by reason of the assignment his right to the property became absolute. *Held*, untenable, and that plaintiff could maintain the action. *Id.*
6. The lien of a mortgage attaches not only to the land in the condition it was at the execution of the mortgage, but to everything which, during its existence, becomes by annexation a part of the realty. *Gates v. De La Mare*. 307
7. When land is acquired by the city of New York for street purposes, all pre existing titles and interests become extinguished, the award of the commissioners of estimate and assessment standing as a substitute for the land taken, and when the lands taken are mortgaged, the mortgagee is entitled to have the award applied upon his mortgage to the extent necessary for his protection. *Id.*
8. In June, 1888, commissioners of estimate and assessment were appointed to acquire title to lands in the city of New York for a street that was laid out through the lands of D., which were then covered by a mortgage. In November, 1888, D. entered into an agreement with defendant, an attorney, authorizing the latter to take proceedings to have any award made to D. for the land taken for the street increased, and agreeing to pay him for his services one-fourth of any increase. In February, 1890, the commissioners made their preliminary report making an award for the land taken. Defendant thereupon appeared before the commissioners, and, by his efforts, the award was increased \$3,484. The final report of the commissioners was confirmed May 1, 1891. After the date of the first report, but before its confirmation, an action was commenced to foreclose the mortgage; the city was not made a party. In March, 1891, judgment of foreclosure and sale was entered: in April the whole of the mortgaged premises were sold pursuant to the judgment, and a deed was executed to the purchaser May 25, 1891. In an action to determine who was entitled to the award, upon which defendant claimed a lien under said agreement, *held*,

that the mortgage was the paramount lien; that the mortgagee, not having been a party to the agreement with defendant, was not bound thereby; that as the sale was before the confirmation of the commissioners' report, and so before the city acquired title (§ 900, chap. 410, Laws of 1882), the purchaser by his deed took title to all the mortgaged premises, and as when the city acquired title the award stood as a substitute for so much of the land purchased as was taken by the city, the purchaser's deed operated to carry the award, and although this was increased by defendant's services, the purchaser was entitled to the whole thereof. *Id.*

See CHATTEL MORTGAGE.
FORECLOSURE.

MOTIONS AND ORDERS.

1. Upon motion to set aside an attachment granted, on the ground that defendant was a non-resident, it appeared that plaintiffs brought the action, as assignees of the claim set forth in the complaint; that their assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, and before the motion costs were paid this action was brought. *Held*, that while plaintiffs' assignors were stayed (Code Civ. Pro. § 779), the stay did not render the present action and the proceedings thereon void, and did not deprive the court of jurisdiction, but only rendered further proceedings irregular; and so did not affect the validity of the attachment; and that it was competent for the court below to deny the motion, in case plaintiffs paid the costs of the former action within twenty days. *Wessels v. Boettcher*. 212

2. By an interlocutory judgment in an action for partition, which directed a sale of the premises, it was provided that the life estate of defendant M., a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of the sale "a gross sum in satisfaction of said tenancy by the

curtesy, to be fixed * * * according to the principles of law applicable to annuities." After entry of said judgment and before a sale, M. died. Thereafter, upon motion, the judgment was amended by striking out the provision in reference to said life estate. *Held*, no error; that the death of the life tenant terminated his interest; this rendered the execution of that part of the judgment directing a sale of that interest impossible, and the proceeds of sale could not equitably be charged with the supposed value of the life which had terminated; and that until a sale the proceedings were incomplete and the right of the life tenant to a share of the proceeds was conditional, not fixed and absolute. *Mingay v. Lackey*. 449

MUNICIPAL CORPORATIONS.

Although, in the absence of a statute providing for compensation, an abutting owner, whose land is injured by the change of grade of a street lawfully made, is without remedy, where the title of such owner extends to the center of the street, if the municipality illegally and wrongfully excavates or otherwise interferes with the street, it is liable to him for the damages. *Folmbee v. City of Amsterdam*. 118

See AMSTERDAM (CITY OF).
PEEKSKILL (VILLAGE OF).
NEW YORK (CITY OF).
VILLAGES.

NATIONAL BANKS.

See BANKS AND BANKING.

NAVIGATION.

See WHARVES.

NEGLIGENCE.

1. A railroad company may not be made liable for the unavoidable or usual consequences to adjacent property of the proper operation

- of its road. *Flinn v. N. Y. C. & H. R. R. Co.* 11
2. Where a building upon adjacent property is destroyed by fire, caused by sparks escaping from passing engines, to make the company liable for the loss, negligence in the management or condition of the engines must be proved. *Id.*
 3. It is the duty of the company to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; but this duty is limited to such contrivances as have been tested and put in use. The company is not bound at once to introduce a new appliance which it is claimed will have the effect to make its engines safer in the respect mentioned; it is entitled to a reasonable time for trial and experiment, and to make the necessary changes. *Id.*
 4. Plaintiff, an employee in defendant's machine shop, was injured by the breaking of a belt used to move machinery. The belt was fastened at a splice with a belt fastener which gave way. In an action to recover damages it appeared that there were several kinds of fasteners in use, all of them liable to break under some unusual strain, and no one could foresee when they would break. The witnesses differed as to which of the fasteners was the safest. A number of the witnesses, who apparently had had the greatest experience with the one used, gave it the preference. It had been manufactured, sold and used in large numbers in this country and elsewhere for several years before the accident. It did not appear that they were less safe than any other fasteners or that any serious accident had ever happened before from the breaking of any fastener. *Held*, that the evidence failed to show any negligence on the part of defendant; and so, that it was not liable. *Harley v. Buffalo C. M. Co.* 81
 5. It appeared that defendant kept on hand in its shop a large number of these fasteners. and when a belt parted it was the duty of the employees to splice it and to use a sufficient number of fasteners for that purpose. *Held*, that if in splicing this belt a sufficient number of fasteners were not used to make it safe the negligence was that of the employees, not the master's. *Id.*
 6. Where a master does not require his servant to repair machinery used by the latter, when out of order, but has a machinist employed to perform that duty, to whom the servant is required to report in case the machinery becomes out of order, it is not required of the master to instruct the servant as to the manner of repairing or the danger of attempting it, and in case the servant does attempt it without orders and is injured, the master is not liable. *McCue v. N. S. M. Co.* 106
 7. In an action to recover damages for injuries to plaintiff's dwelling, alleged to have been caused by negligent blasting in excavating on defendant's adjoining premises, the answer was a general denial, save as to the ownership of defendant's premises. On the trial defendant was permitted to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation. *Held*, no error; that the action was not for a trespass or the creating of a nuisance, but for negligence; that defendant was entitled under the answer to show that the act of negligence complained of was not his but that of another, and if done by an independent contractor he was not liable. *Roemer v. Striker.* 184
 8. The cause of action given by the statute (Code Civ. Pro. §§ 1902-1905) to the executors or administrators of a deceased person, to recover damages for negligence causing his death, is no part of the assets of his estate; it is not subject to the payment of his debts or to the ordinary rules applicable to the settlement and administra-

- tion of the estates of deceased persons. *Stuber v. McEntee*. 200
9. The claim cannot be barred or released before suit except by some person who has at the time authority to bring the action. *Id.*
 10. In an action under the statute it appeared that defendant paid to one of the plaintiffs before his appointment as administrator a sum of money, he giving a receipt therefor which stated that the payment was for all expenses caused by the death, and that he had no further claim against defendant. *Held*, that the receipt was not a settlement of the claim or a bar to the action. *Id.*
 11. *It seems* that in such case defendant would be entitled to show that the money paid was used to pay the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in estimating the damages. *Id.*
 12. Defendant was a plumber; the deceased, an apprentice in his employ. It appeared that the deceased was killed by the caving in of the sides of a trench or excavation in which he was engaged in plumbing work. *Held*, that in the absence of other proof or explanation, the inference was reasonable or at least possible, that the trench was the place furnished the servant by defendant in which to do his work, and so a refusal to submit the question to the jury was error. *Id.*
 13. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that about seven A. M. of March 12, 1888, during a snow storm of extraordinary severity, known as the "blizzard," plaintiff entered a car on one of defendant's trains standing at a station. The track was blocked by other trains ahead which were stopped by the snow that clogged the tracks. Another train ran into that in which plaintiff was, causing the injury complained of. Prior to that time the storm had apparently abated; no accidents had, as far as was shown, occurred, and up to about that time the street surface roads had continued running their cars. The storm commenced again soon after and all traffic was discontinued. The weather forecasts of the day before gave no indication that such a storm was to be expected. It had stopped snowing about five A. M., and defendant's cars were crowded with passengers. Plaintiff claimed that the entire operation of the road should have been suspended. Defendant's counsel requested the court to charge that "the evidence did not justify a finding that defendant should not have operated its railway at all at the hour when the accident occurred." This the court refused, and submitted it to the jury to determine as to "whether the evidence does establish negligence on the part of defendant to operate at the time and at the hour specified." *Held*, error; that it was defendant's duty under its charter to continue to run its trains if practicable; and that the evidence did not authorize an imputation of negligence for not earlier suspending traffic. *Connelly v. M. R. Co.* 377
 14. Where a servant is injured by the negligent performance of an act or duty which the master as such is required to perform the latter is liable, although the negligence was that of another servant to whom the performance of the act or duty was intrusted, and this, without regard to the rank or title of the person guilty of the negligence. *Hankins v. N. Y., L. E. & W. R. R. Co.* 416
 15. The master is not relieved from liability in such case by the fact that he has promulgated rules or regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter. *Id.*
 16. A train dispatcher in ordering the movements of railroad trains, performs a duty resting upon the railroad company, and so as to its employees, his acts are those of the company. *Id.*
 17. Plaintiff, a fireman on one of defendant's freight trains, was in-

- jured by a collision with another train. Both trains were behind schedule time and their movements were controlled by special telegraphic orders from one of defendant's train dispatchers, and the accident was caused by the negligence of the train dispatcher in giving those orders. In an action to recover plaintiff's damages, *held*, that defendant was liable. *Id.*
18. One inviting another upon his premises does not thereby become the absolute insurer of the safety of the other except as against his own negligence. *Flynn v. Centl. R. R. Co. of N. J.* 439
19. The owner of premises occupied for business purposes, as a general rule, is simply required to use reasonable prudence and care to keep his property in such a condition that those who go thereon shall not be unreasonably and unnecessarily exposed to danger. *Id.*
20. Plaintiff, a grain shoveler, was employed on board a grain elevator lying alongside one of defendant's piers in transferring grain to a car standing on a track. Between that track and the elevator was another track upon which empty cars were standing. Between two of these cars a space was left through which those employed in loading said car passed to and fro. While plaintiff was passing through this space the empty cars were suddenly forced together and he was injured. In an action to recover damages, the court charged in substance that the rule of law is if a person invites another to come upon his premises, which he controls, "he is responsible for any injury which ensues * * * unless the fact is that the person is negligent himself." *Held*, error. *Id.*
21. In an action against a town to recover damages for the death of plaintiff's intestate, alleged to have been caused by a defect in one of its highways, these facts appeared: There are about 230 miles of road in the town, eighty of which are along dugways and up steep ravines. The road where the accident occurred passes through a mountainous wooded section, used mainly for drawing heavy loads of lumber and wood, and for a distance of five miles but two or three families live upon it. The road was built about twenty years previously and was properly constructed; it ran along the side of a steep hill with a retaining wall along the lower side, and on top of the wall, guards consisting of logs about sixteen inches in diameter were placed. The water from a spring on the hillside above was conducted across the road by means of a waterbar and was discharged over the retaining wall. The road at this point, which was at the foot of the hill, was nearly on a level; it had become filled up to the top of the guard, or nearly so; the roadbed was from twelve to fifteen feet wide, and from the upper to the lower side there was a slope of about eighteen inches. The lower wagon track was about four feet from the guards. The road had been in this condition about eight years, and no accident had previously happened. Previous to the accident ice had formed upon the waterbar, and shortly before there had been an extraordinarily severe snow storm. The snow had drifted deeply into the road and was soft from thawing; the lower sleigh track had worn down to a few inches from the guards. The deceased came down the hill on a load of logs on two bobs. The ice and snow caused the rear bob to slide, its lower runner went over the wall, the load was overturned and the deceased killed. *Held*, that the evidence failed to show actionable negligence on the part of the commissioners of highways, and that a refusal to non-suit was error. *Lane v. Town of Hancock.* 510
22. Wharfingers do not guarantee the safety of vessels coming to their wharves. They are bound simply to use ordinary care to make the places in front of their wharves reasonably safe for vessels to approach and lie there. *McCaddin v. Parke.* 564

23. Defendants owned a wharf in the East river. Plaintiff's vessel, which had been chartered by defendants, while approaching the wharf to deliver a cargo consigned to them, struck a rock in the bottom of the river about seventy feet from the wharf and was injured. In an action to recover damages it appeared that all the approaches to the wharf were safe, but the one over the rock, and hundreds of vessels had gone to the wharf in safety, in all stages of the tide. A surveyor who had examined and located the rock testified, in substance, that in his judgment it was not part of the bottom of the river, but had fallen in there. It also appeared that previous to the accident it had not been heard of and no similar accident had previously happened. Defendants had caused the basin in front of their wharf to be dredged out, and it did not appear that the rock was in the ordinary approach to the wharf, or that defendants had any control of the part of the river where it was, or had any right to remove it. *Held*, that the testimony failed to make out a cause of action. *Id.*

24. Plaintiff claimed that defendants had contracted to give him for the approach of his vessel to the wharf sixteen feet of water. Nothing to that effect was contained in the charter party, and the only evidence was plaintiff's testimony to the effect that when negotiating for the charter party one of the defendants said that they were making arrangements to have their dock dredged out, and would give him sixteen feet of water at all stages of the tide. *Held*, that the evidence failed to show a contract as to the depth of the water; but that what was said was a mere representation, and if made in good faith defendants could be charged only for negligence. *Id.*

— When question of negligence one of law.

See *Flinn v. N. Y. C. & H. R. R.*

R. Co. 11

Harley v. B. Car Co. 81

Connelly v. M. R. Co. 377

NEWSPAPERS.

1. Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of the nominations for offices to be filed at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city, in making the selection the board acts judicially, and its action may be reviewed by certiorari. *People ex rel. v. Martin.* 228
2. The publisher of a paper not selected, claiming to have the largest circulation, has sufficient interest to institute proceedings by certiorari. *Id.*
3. While said board may not, under the act, arbitrarily designate the newspapers without making any inquiry or effort to obtain the best information as to their circulation, but must act in good faith and seek for information, they are not bound to resort to any particular evidence or to give to the various newspaper representatives a formal hearing. *Id.*

NEW YORK (CITY OF).

1. Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of the nominations for offices to be filed at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city, in making the selection the board acts judicially, and its action may be reviewed by certiorari. *People ex rel. v. Martin.* 228
2. The publisher of a paper not selected, claiming to have the largest circulation, has sufficient interest to institute proceedings by certiorari. *Id.*
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newspapers without making any inquiry or effort to obtain the best information as to their circulation, but must act in good faith and seek for information, they are not bound to resort to any particular evidence or to give to the various newspaper representatives a formal hearing. *Id.*

4. In proceedings by certiorari to review the action of said board in making such a selection, these facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator with a request that *The World*, the newspaper published by it, should be selected, which affidavit stated that the circulation of said newspaper exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners in substantiation of its claims. No other communication was had between the relator and the board until after the selection was made. Thereafter relator presented to the board an affidavit to the effect that the circulation of *The World* in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claim; this request the board denied, and refused to re-consider the decision made. In their return to the writ the police commissioners alleged that in making the designation they selected the newspapers which, according to the best information they could obtain, had the largest circulation within the city. *Held*, there was nothing in the record showing that the determination of the board was erroneous, as at the time of the designation it had been furnished with no evidence that *The World* had a larger circulation in the city than any other newspaper; that its circulation might be larger in the country, as stated in the first affidavit, but not as large in the city, and the second affidavit and offer came too late; that the court was bound to take the return as true, and it showed a full compliance with the statute. *Id.*

5. When land is acquired by the city of New York for street purposes, all pre-existing titles and interests become extinguished, the award of the commissioners of estimate and assessment standing as a substitute for the land taken, and when the lands taken are mortgaged, the mortgagee is entitled to have the award applied upon his mortgage to the extent necessary for his protection. *Gates v. De La Mare.* 307

6. In June, 1888, commissioners of estimate and assessment were appointed to acquire title to lands in the city of New York for a street that was laid out through the lands of D., which were then covered by a mortgage. In November, 1888, D. entered into an agreement with defendant, an attorney, authorizing the latter to take proceedings to have any award made to D. for the land taken for the street increased, and agreeing to pay him for his services one-fourth of any increase. In February, 1890, the commissioners made their preliminary report making an award for the land taken. Defendant thereupon appeared before the commissioners, and, by his efforts, the award was increased \$3,484. The final report of the commissioners was confirmed May 1, 1891. After the date of the first report, but before its confirmation, an action was commenced to foreclose the mortgage; the city was not made a party. In March, 1891, judgment of foreclosure and sale was entered; in April the whole of the mortgaged premises were sold pursuant to the judgment, and a deed was executed to the purchaser May 25, 1891. In an action to determine who was entitled to the award, upon which defendant claimed a lien under said agreement, *held*, that the mortgage was the paramount lien; that the mortgagee, not having been a party to the agreement with defendant, was not bound thereby; that as the sale was before the confirmation of the commissioners' report, and so before the city acquired title (§ 900, chap. 410, Laws of 1882), the purchaser by his deed took title to all the mortgaged

premises, and as when the city acquired title the award stood as a substitute for so much of the land purchased as was taken by the city, the purchaser's deed operated to carry the award, and although this was increased by defendant's services, the purchaser was entitled to the whole thereof. *Id.*

7. The act of 1893 (Chap. 498, Laws of 1893), exempting from taxation so much of the real estate of certain religious corporations as is used exclusively for its corporate purposes, became a law April 29, 1893. The act, by its terms, declares that it "shall take effect immediately." All of the real estate of the relator, a religious corporation in the city of New York, was assessed for that year. *Held*, that, as by the New York Consolidation Act (Chap. 410, Laws of 1882), the books containing the "annual record of the assessed valuation of real and personal estate" remain open until the first day of May, and up to that time the commissioners of assessment and taxation have power to correct them in respect to valuations, the real estate used exclusively by the corporation for its own purposes was exempted from taxation; that the commissioners were authorized and required to remove the entry thereof from the books; and that a mandamus requiring the commissioners to remit the tax assessed thereon was properly granted. *People ex rel. v. Comrs. Taxes, etc.* 348

8. While, where a decision of the board of police commissioners of the city of New York removing a patrolman from the police force has been affirmed by the General Term, this court cannot interfere if there was any evidence fairly sustaining the decision, it may review and reverse it where there is no real conflict in the evidence and there is a substantial failure of evidence to sustain the decision. *People ex rel. v. Martin.* 352

OFFICE AND OFFICERS.

1. The provisions of the act of 1884 (Chap. 312, Laws of 1884), as

amended in 1887 (Chap. 464, Laws of 1887), giving to honorably discharged Union soldiers and sailors a preference for appointment and employment in all public departments, and imposing upon all public officers having the power of appointment the duty of a faithful compliance with the act, does not abrogate or repeal a power to discharge which existed prior to its passage. *People ex rel. v. Lathrop.* 113

2. In the absence of restraints imposed by the Constitution or by statute, the power of appointment to office implies the power of removal when no definite term is attached to the office by law. *Id.*
3. Accordingly *held*, that the power given by the Constitution to the agent and warden of a state prison to appoint certain officers thereof including keepers, gave to the warden the power of removal, and, assuming that the power is subject to legislative regulation, it was not abrogated by said act in the case of an honorably discharged soldier who had been appointed a keeper in a state prison. *Id.*
4. Also *held*, that even if the discretion of the appointing power was limited as to removals by said act, these restrictions were removed by the act of 1889 (Chap. 382, Laws of 1889), which confers power on the agent and warden to appoint and remove keepers. *Id.*

PARTIES.

1. The will of M. directed his executors to divide his residuary estate into as many shares as he had children, and gave, for each child surviving him, one share to the executors to be held in trust for said child for life. Upon the death of the beneficiary the executors were directed to "convey, transfer, pay over and deliver" the share to his or her lawful issue if any survived the parent. In case none survived provision was made for the disposition of such share. All of the testator's children and

sixteen grandchildren were living at his death. In an action for partition of lands of an interest in which M. died seized, the grandchildren were not made parties. In an action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit, *held*, that the issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in after-born children, and to be divested by their death before the death of the parent; that the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power. *Campbell v. Stokes.* 23

2. Accordingly *held*, that the grandchildren of the testator were necessary parties to the partition suit, and so that plaintiff's title was defective and he was not entitled to enforce his contract. *Id.*

8. Under the provision of the Code of Civil Procedure (§ 829) prohibiting a party to an action from testifying in his own behalf against the executor or administrator of a deceased person, as to a personal transaction or communication with the deceased, except when the executor or administrator has testified in his own behalf in reference thereto, the exception is confined strictly to the transaction testified to by the personal representative; the party may not be permitted to testify to another and independent personal transaction, for the purpose of explaining, impairing or contradicting the testimony so given. *Martin v. Hillen.* 140

4. The holder of bonds issued by a corporation, secured by a trust mortgage, are the real parties in interest, and when any emergency happens which makes a demand upon the trustee to foreclose the

mortgage futile, and leaves the right of a bondholder, without other reasonable means of redress, this authorizes his appearance as plaintiff in an action to foreclose. *Ettlinger v. P. R. & C. Co.* 189

5. Plaintiff was one of two bondholders protected by a trust mortgage. In an action to foreclose the mortgage the complaint set forth the requisite facts to justify a foreclosure, and also alleged that the trustee had left this country, was living abroad and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had departed to join him abroad, and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The complaint was dismissed on the ground that plaintiff could not maintain the action where there was a competent trustee unless he refused to act, and if he had become incompetent it was necessary first to procure the appointment of a new trustee. *Held*, untenable; and that the facts proved justified the bringing of the action by plaintiff. *Id.*

— *A lessee of lands acquired by a railroad company by condemnation proceedings a necessary party to an action by owner to recover possession because of alleged abandonment of the easement acquired by the company.*

See Roby v. N. Y. C. & H. R. R. Co. 176

PARTITION.

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tion of lands of an interest in which M. died seized, the grandchildren were not made parties. In an action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit, *held*, that the issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in after-born children, and to be divested by their death before the death of the parent; that the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power. *Campbell v. Stokes.*

23

2. Accordingly *held*, that the grandchildren of the testator were necessary parties to the partition suit, and so that plaintiff's title was defective, and he was not entitled to enforce his contract. *Id.*

3. By an interlocutory judgment in an action for partition, which directed a sale of the premises, it was provided that the life estate of defendant M., a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of the sale "a gross sum in satisfaction of said tenancy by the curtesy, to be fixed * * * according to the principles of law applicable to annuities." After entry of said judgment and before a sale M died. Thereafter, upon motion, the judgment was amended by striking out the provision in reference to said life estate. *Held*, no error; that the death of the life tenant terminated his interest; this rendered the execution of that part of the judgment directing a sale of that interest impossible, and the proceeds of sale could not equitably be charged with the supposed value of the life which had terminated and that until a sale the proceeds were incomplete and the right

of the life tenant to a share of the proceeds was conditional, not fixed and absolute. *Mingay v. Lackey.*

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PARTNERSHIP.

1. Where a partnership is dissolved by mutual consent, and one of the co-partners is appointed liquidator, the duty imposed upon him is one of agency. No new authority is given to him and no direct trust is created, but the authority the partnership conferred continues, limited, however, so as to include only that which is necessary for a settlement of the business. *Gilmore v. Ham.*

1

2. A right of action in favor of the retiring against the liquidating partner for an accounting does not accrue at the time of the dissolution; nor is it postponed until the last item of partnership business is settled and closed. The liquidator is bound to be diligent, and where there has been a needless delay equity may interfere. *Id.*

3. The right of action, therefore, accrues, and the Statute of Limitations begins to run against it when, under the circumstances of the particular case, the liquidating partner has had a reasonable time within which to perform his duty, and so is in fault for not fully completing it. *Id.*

4. In an action for an accounting and contribution between co-partners, brought in 1890, it appeared that in 1869 plaintiff abandoned the partnership and left the state. Defendant shortly after published a notice of the dissolution of the firm, and that he would close its affairs. In 1871 defendant sold out and received his pay for the partnership stock of goods then in his possession; he paid the firm debts, except one note, and he had ample assets in his hands to pay that. An action was brought upon this note in 1886; plaintiff alone defended; as the Statute of Limitations did not protect him because of his continued absence from the state, judgment was rendered against him and he was compelled to pay the full amount of the note and

accrued interest. *Held*, that judgment was properly rendered against defendant, in accordance with the prayer of the complaint, for contribution of one-half the amount so paid by plaintiff; but that the cause of action for an accounting was barred by the statute; that the case was to be considered as if the partnership had been dissolved by mutual consent and defendant appointed the liquidating partner, and when in 1871 he turned the firm assets into money his duty required payment by him of all the firm debts, and the cause of action for an accounting then accrued and the statute began to run. *Id.*

5. Where upon the dissolution of a partnership no special agreement is made as to liquidation, the partnership continues for that purpose; each of its members has an equal right with the others to the possession of the firm assets, and is under an equal duty to apply those assets to the discharge of the debts. *Gray v. Green.* 316

6. While each is so engaged, acting with reasonable diligence and without discord, equity may not intervene until a final settlement is possible, in which one party or the other refuses and neglects to join. *Id.*

7. Until such refusal, therefore, by one of the co-partners, the Statute of Limitations does not begin to run against a cause of action for an accounting. *Id.*

8. Accordingly *held*, where, prior to the dissolution of a partnership by mutual consent, without any agreement for liquidation, one of the partners had, without right as between him and his co-partner, withdrawn a sum of money from the firm, and after the dissolution both acted faithfully in liquidation; upon the completion of which the partner who had made the over-draft refused to account; that the Statute of Limitations only then began to run against a cause of action in favor of his co-partner for an accounting, at least in the absence of a finding that the former had, prior to that time, refused to

apply the over-draft to the purposes of the liquidation. *Id.*

PATENTS (FOR INVENTIONS).

1. Plaintiff, being the owner of a patented device, to be used in the manufacture of wagons, entered into an agreement with the firm of J. & W., of which firm defendant is the surviving partner, by which he granted to that firm the right to use the device upon all wagons made by it, and to grant licenses to others to use it, the firm to pay him one dollar and twenty-five cents for each wagon made and sold, and one-fourth of the amount received for licenses granted. Some time after the execution of the contract said firm began the manufacture of "gears," in the first place for the purpose of advertising its wagons. These gears were gradually introduced to the trade, and sold by the firm to dealers as a separate article; each cost about \$8 and were sold for \$9; the wagons were sold at prices ranging from \$100 to \$200. In an action upon the contract plaintiff claimed that the gears were to be treated as wagons, and that he was entitled to the agreed royalty for each one sold. *Held*, untenable; also that the manufacture and sale of the gears was not included in the right to grant licenses, and so plaintiff was not entitled to one-fourth of the receipts; but that such a use of the patented article was not provided for or granted by the contract, and as plaintiff had consented to the use he could not claim an infringement of his patent, but was simply entitled to recover the reasonable value of such use. *Griffin v. White.* 539

2. The state courts have no jurisdiction of an action for an infringement of a patent, and so, unless there is an agreement on the part of the owner of the patent for the manufacture and sale of a patented article, an action is not maintainable in said courts to recover therefor. *Denise v. Swett.* 602

3. In 1882 B., the owner of a patent, and plaintiff's assignor, and the

firm of S. & S., entered into an agreement by which he gave to the firm a license to manufacture and sell the patented article for one year on payment of specified royalties. By the terms of the agreement the firm had the privilege of renewing the license on giving sixty days' notice. The agreement was renewed until May 1, 1885, when a new agreement was made renewing it for another year, but any further extension to depend upon the mutual agreement of the parties. Pending negotiations for renewal the firm continued to manufacture the article and paid the agreed royalties up to June 30, 1886. No new agreement was made. B. notified the firm that the license was revoked, and the old agreement was considered by both parties as terminated at that time. The firm, however, thereafter manufactured and sold an article varying in some particulars from the patent, but in substance the same, which it claimed was not an infringement upon the rights secured by the letters patent. In an action to recover royalties for the goods so manufactured, *held*, that the continued manufacture and the failure of B. to take further action to prevent it after said notice, did not amount to a waiver of the notice or a renewal of the license, and so plaintiff was not entitled to recover the agreed royalties; that the only cause of action was for an infringement, of which the state court had no jurisdiction. *Id.*

PEEKSKILL (VILLAGE OF).

1. The power so to extend the boundaries of a village specially chartered is not given by the provision of the act of 1884 (Chap. 308, Laws of 1884), declaring "that the trustees and officers of any village of this state created by special charter, shall have and possess the same powers as are prescribed in any general act for the incorporation of villages," etc. The added powers are given to the village officers, not to the board of supervisors, and they do not include the enlargement of the vil-

lage boundaries. *People ex rel. v. Mabie.* 343

2. Where, therefore, the board of supervisors of Westchester county, on petition of the trustees of the village of Peekskill, organized under a special charter (Chap. 117, Laws of 1883), passed an act extending its boundaries, and the village assessors included in their assessment roll the lands so attempted to be brought within the corporate limits, *held*, that said assessments were illegal and were properly stricken from the roll. *Id.*

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PIERS.

See WHARVES.

PLEADING.

1. In an action to recover damages for injuries to plaintiff's dwelling, alleged to have been caused by negligent blasting in excavating on defendant's adjoining premises, the answer was a general denial, save as to the ownership of defendant's premises. On the trial defendant was permitted to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation. *Held*, no error; that the action was not for a trespass or the creating of a nuisance, but for negligence; that defendant was entitled under the answer to show that the act of negligence complained of was not his but that of another, and if done by an independent contractor he was not liable. *Roemer v. Striker.* 184
2. The question as to whether an action is referable without consent of both parties is to be determined from the complaint alone. If the cause of action there set forth is not referable without consent and the same is put in issue, defendant

is entitled to trial by jury, and the action is not made referable by anything set up in the answer. (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting.) *Steck & C. F. & I. Co.* 236

3. In an action for libel the complaint averred that plaintiff was of "good character and repute, and enjoyed the respect of her friends and acquaintances and of the community." This was put in issue by the answer. Testimony was offered by plaintiff on the trial to prove her allegations, which was received under objection and exception. *Held*, that in the absence of any disclaimer on the part of defendant when the objection was raised of any purpose of questioning plaintiff's reputation, the reception of the testimony was not error; that while it was unnecessary for plaintiff to make the averment, having done so, and defendant having made an issue thereon, this opened the door for the evidence. *Stafford v. M. J. Assn.* 598

PLEDGE.

- C. shipped a cargo of peas from Kingston, Canada, to Cape Vincent, consigned to a Kingston bank, care of plaintiff, a warehouseman at Cape Vincent. Plaintiff received the cargo and delivered to C. a warehouse receipt stating that the peas were held subject to the order of the consignee. C. drew a draft against the consignment on defendant, which was duly accepted by it under an agreement that it was to have possession of the cargo on payment of the draft. The warehouse receipt to be held meanwhile as security. The draft with the warehouse receipt attached as security, was discounted by said bank. Defendant, after acceptance and before maturity of the draft, took the cargo from plaintiff's possession without his permission. Defendant having failed to pay the draft, plaintiff paid it, on demand being made by the bank for the cargo, and thereupon the draft with the warehouse receipt was duly transferred to him. *Held*, that plaintiff was

entitled to recover of defendant the amount of the draft; that the provisions of the Penal Code (§ 633) forbidding a warehouseman from delivering to another than the holder of a warehouse receipt issued by him, the property covered by it, did not apply. *Burnham v. C. V. Seed Co.* 169

POLICE.

1. Under the provision of the Election Law of 1892 (§ 61, chap. 680, Laws of 1892), which provides that the board of police commissioners of the city of New York, in selecting the papers in which to publish the list of the nominations for offices to be filled at an election, shall select those "which, according to the best information he can obtain, have the largest circulation within" the city, in making the selection the board acts judicially, and its action may be reviewed by certiorari. *People ex rel. v. Martin.* 228
2. The publisher of a paper not selected, claiming to have the largest circulation, has sufficient interest to institute proceedings by certiorari. *Id.*
3. While said board may not, under the act, arbitrarily designate the newspapers without making any inquiry or effort to obtain the best information as to their circulation, but must act in good faith and seek for information, they are not bound to resort to any particular evidence or to give to the various newspaper representatives a formal hearing. *Id.*
4. In proceedings by certiorari to review the action of said board in making such a selection, these facts appeared: Before the selection was made an affidavit was presented to the board on behalf of the relator with a request that *The World*, the newspaper published by it, should be selected, which affidavit stated that the circulation of said newspaper exceeded by many thousands that of any other newspaper published in the United States, and that it was ready upon demand to submit its books to the police commissioners

in substantiation of its claims. No other communication was had between the relator and the board until after the selection was made. Thereafter relator presented to the board an affidavit to the effect that the circulation of *The World* in the city of New York exceeded by 75,000 that of the newspapers selected, and requested permission to present evidence substantiating its claim; this request the board denied, and refused to re-consider the decision made. In their return to the writ the police commissioners alleged that in making the designation they selected the newspapers which, according to the best information they could obtain, had the largest circulation within the city. *Held*, there was nothing in the record showing that the determination of the board was erroneous, as at the time of the designation it had been furnished with no evidence that *The World* had a larger circulation in the city than any other newspaper; that its circulation might be larger in the country, as stated in the first affidavit, but not as large in the city, and the second affidavit and offer came too late; that the court was bound to take the return as true, and it showed a full compliance with the statute. *Id.*

5. *It seems*, if the return is evasive or not sufficiently full, the relator could have compelled a further return (Code Civ. Pro. § 2135), but having elected to stand upon the return as made it was to be taken as true. *Id.*

6. While, where a decision of the board of police commissioners of the city of New York removing a patrolman from the police force has been affirmed by the General Term, this court cannot interfere if there was any evidence fairly sustaining the decision, it may review and reverse it where there is no real conflict in the evidence and there is a substantial failure of evidence to sustain the decision. *People ex rel. v. Martin.* 852

POSSESSION.

1. One in possession of land merely, without other actual title, has an

estate in the land which he may transfer, and in case he conveys with covenant of warranty running to the grantee, his heirs and assigns, he transfers an estate to which his covenant attaches, and it may be enforced by one succeeding to the grantee's title. *Mygatt v. Coe.* 78

2 In an action to restrain defendant, a village incorporated under the general law, from interfering with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, in 1887, after the discontinuance, entered into possession and inclosed the same with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who has since used and occupied the same. *Held*, that as against defendant, plaintiff's possession was a sufficient title to sustain the action. *Excelsior Brick Co. v. Village of Haverstraw.* 146

POWERS.

1. The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. In an action to compel specific performance of the contract, *held*, that the power of sale was not given for the benefit of the remaindermen simply, but its chief purpose was the benefit and safety of the life tenant; and so, that the power was not extinguished by the death of M.

and the deed of the executrix was sufficient to carry the fee. *Cotton v. Burkelman.* 160

2. Where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power unless coupled with a trust is not imperative, but its execution depends entirely upon the will of the grantor. *Towler v. Towler.* 871
3. It is only when a power is in trust that a court of equity will decree its execution. *Id.*
4. T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by will a life estate in one-third thereof to "any hereafter-taken wife." The grantor thereafter married, and died without executing the power. *Held*, that the widow was not entitled to any interest in the land; that the reservation at most created a mere power, and so, to be executed or not at the pleasure of the grantor. *Id.*
5. As to whether the reservation can be treated as a power within the meaning of the Revised Statutes (1 R. S. 732, § 105), *quere.* *Id.*

PRACTICE.

1. *It seems*, when a non-resident defendant, who has not been personally served with the summons, does not intend to submit himself to the jurisdiction of the court, he may either appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to take judgment by default; the question of jurisdiction will be available if he has not waived it by his own act. *Reed v. Chilson.* 152
2. When resort to the real estate of a decedent for the payment of his debts is sought by his creditors, the prescribed statutory proceedings must be strictly pursued. *Long v. Long.* 545

See APPEAL.
PLEADING.
TRIAL.

PRESUMPTIONS.

In an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence, it appeared that defendant was a plumber; the deceased, an apprentice in his employ. The latter was killed by the caving in of the sides of a trench or excavation in which he was engaged in plumbing work. *Held*, that in the absence of other proof or explanation, the inference was reasonable or at least possible, that the trench was the place furnished the servant by defendant in which to do his work, and so a refusal to submit the question to the jury was error. *Stuber v. McEntee.* 200

PRINCIPAL AND AGENT.

While a court of equity may have jurisdiction of an action, brought by a principal against his agent, for an accounting as to property intrusted to defendant as agent, this does not make the action necessarily referable. *Empire State T. & T. Co. v. Bickford.* 224

— *When principal chargeable with knowledge of agent.*
See Forward v. Con. Ins. Co. 382

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.

PROPERTY.

— *When destruction of property, used for the perpetration of a trespass, proper.*
See People v. Kane. 366

QUEENS (COUNTY OF).

The act of 1891 (Chap. 290, Laws of 1891), which authorizes and empowers the boards of supervisors of the counties of Kings and Queens to build a bridge, at a point specified, over navigable waters dividing the two counties, "or to show cause," etc., is in con-

travention of the provision of the State Constitution (Art. 18, § 8) prohibiting the state legislature from passing local bills providing for building bridges. *People ex rel. v. Bd. Suprs. Queens Co.* 271

RAILROAD CORPORATIONS.

1. A railroad company may not be made liable for the unavoidable or usual consequences to adjacent property of the proper operation of its road. *Flinn v. N. Y. C. & H. R. R. Co.* 11
2. Where a building upon adjacent property is destroyed by fire, caused by sparks escaping from passing engines, to make the company liable for the loss, negligence in the management or condition of the engines must be proved. *Id.*
3. It is the duty of the company to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; but this duty is limited to such contrivances as have been tested and put in use. The company is not bound at once to introduce a new appliance which it is claimed will have the effect to make its engines safer in the respect mentioned; it is entitled to a reasonable time for trial and experiment, and to make the necessary changes. *Id.*
4. In an action to recover damages for injuries to and the final destruction of a building on plaintiff's premises which adjoined defendant's road these facts appeared: In 1874 defendant laid down a new track, which came within about three and a half feet of plaintiff's building. There was a steep grade in defendant's road where it passed plaintiff's lot, and engines, because of the heavy pull in drawing the trains up it, emitted large quantities of cinders and sparks; these frequently set fire to the building, and in 1884 it was destroyed by fire thus started. It did not appear that the fires were caused by any defects in said engines, and up to 1881 it was undisputed that defendant used upon its engines the most approved spark arresters; there was a regular system of daily inspection of the smoke stacks and spark arresters, and if defects were discovered they were at once repaired. In 1880 a new spark arrester begun to come into use which reduced the number of escaping sparks. Defendant had, prior thereto, begun to use it in its freight engines, and had kept on altering them, and before the trial of the action the new system was in general, but not universal use. Defendant, after 1880, had about 1,000 engines in use. *Held*, the evidence did not justify a verdict for plaintiff; that defendant could not be charged with negligence in not fully introducing the new system of arresting sparks upon all of its engines previous to the fire, in the absence of evidence that it was reasonably practicable and possible so to do. *Id.*
5. An award, in proceedings to condemn lands for railroad purposes, to the owner of a farm crossed by the track of the road, does not deprive the owner of his right to compel the railroad company to construct suitable crossings. It is to be assumed that both parties stood upon their legal rights as to crossings, and they are in no manner extinguished or affected by the award. *Beardsley v. Lehigh Valley R. R. Co.* 173
6. Accordingly *held*, that an award in such proceedings, in the absence of evidence showing that the damages awarded rested to any extent upon the form or manner of constructing the crossings, was no defense to an action brought to compel defendant to construct an underground crossing. *Id.*
7. The interest which a railroad company acquires in land condemned for the use of its road is a permanent easement, and while it exists the company is entitled to the exclusive use, possession and control of the land. *Roby v. N. Y. C. & H. R. R. Co.* 176.

8. While the easement may be abandoned, and the owner of the fee again become entitled to the possession, this must be done by unequivocal acts showing clearly such to be the intent, or by a non-user continued for a long time. *Id.*
9. The mere use of the easement for a purpose not authorized, its excessive use or misuse, or a temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. *Id.*
10. A railroad company to whose rights defendant has succeeded acquired by condemnation proceedings the use of a strip of land, and tracks were laid thereon. In an action by plaintiff, who has succeeded to the rights of the original owner, to recover possession, these facts appeared: In 1889 defendant leased the land to Y. for a term of fifteen years. The lease provided that the land was only to be used for a coal yard and trestle for receiving and handling coal transported over defendant's road. A right was reserved to terminate the lease at any time upon giving six months' notice, and defendant reserved "the use and control of the said track and trestle for all the purposes of a railroad, together with the strip of land." Y. went into possession, built the trestle with coal bins beneath, and since then has had the exclusive use and control of the land for his coal business, and no one else except defendant's agents and employees, and persons having business with Y. could have access thereto. The only use defendant thereafter made of the land and track was to deliver coal to Y. *Held*, the evidence failed to show an abandonment and consequent loss of defendant's easement; and so, that a verdict and judgment in favor of plaintiffs were error.
11. Also *held*, that a modification of the judgment, so as to make it subject to the proper easement of defendant, instead of a reversal, was not proper, as Y. was not a party and had not been heard. *Id.*
12. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that about seven A. M. of March 12, 1888, during a snow storm of extraordinary severity, known as the "blizzard," plaintiff entered a car on one of defendant's trains standing at a station. The track was blocked by other trains ahead which were stopped by the snow that clogged the tracks. Another train ran into that in which plaintiff was, causing the injury complained of. Prior to that time the storm had apparently abated; no accidents had, as far as was shown, occurred, and up to about that time the street surface roads had continued running their cars. The storm commenced again soon after and all traffic was discontinued. The weather forecasts of the day before gave no indication that such a storm was to be expected. It had stopped snowing about five A. M., and defendant's cars were crowded with passengers. Plaintiff claimed that the entire operation of the road should have been suspended. Defendant's counsel requested the court to charge that "the evidence did not justify a finding that defendant should not have operated its railway at all at the hour when the accident occurred." This the court refused, and submitted it to the jury to determine as to "whether the evidence does establish negligence on the part of defendant to operate at the time and at the hour specified." *Held*, error; that it was defendant's duty under its charter to continue to run its trains if practicable; and that the evidence did not authorize an imputation of negligence for not earlier suspending traffic. *Connolly v. M. R. Co.* 377
13. A train dispatcher in ordering the movements of railroad trains, performs a duty resting upon the railroad company, and so as to its employees, his acts are those of the company. *Hankins v. N. Y., L. E. & W. R. R. Co.* 416
14. Plaintiff, a fireman on one of defendant's freight trains, was injured by a collision with another train. Both trains were behind schedule time and their movements were controlled by special

telegraphic orders from one of defendant's train dispatchers, and the accident was caused by the negligence of the train dispatcher in giving those orders. In an action to recover plaintiff's damages, *held*, that defendant was liable. *Id.*

RATIFICATION.

The ratification of an unauthorized act to be binding must be by a competent person, with knowledge of all the facts, and of their legal bearing upon his rights. *Long v. Long.* 545

RE-ARGUMENT.

— *When motion for re-argument should be denied.*

See O'Brien v. Mayor, etc. (Mem.) 671

REFERENCE.

1. While a court of equity may have jurisdiction of an action, brought by a principal against his agent, for an accounting as to property intrusted to defendant as agent this does not make the action necessarily referable. *Empire State T. & T. Co. v. Bickford.* 224
2. The complaint herein asked that defendant account as to his transactions as agent for plaintiff in respect to these items: (1) Receipts and disbursements of plaintiff's moneys; (2) the conversion of personal property belonging to plaintiff and intrusted to defendant; (3) revenue lost to plaintiff by reason of defendant's neglect of his duties and his attempt to establish a competing business; (4) the proportion of the cost of equipment by plaintiff of a new place of business rendered necessary by defendant's wrongful acts and omissions. An order of reference was granted on motion of plaintiff. *Held*, error; that the first item was the proper subject of an accounting; that while the second might also be, it was not necessarily referable; that the other two items were not matters of account or of equitable cognizance; that the action should be treated as a

whole, and so considered was an action at law and not one in equity. *Id.*

3. *It seems*, after the issues at law have been tried, if an accounting as to receipts and disbursements becomes necessary a reference may be ordered to take it. *Id.*

4. The question as to whether an action is referable without consent of both parties is to be determined from the complaint alone. If the cause of action there set forth is not referable without consent and the same is put in issue, defendant is entitled to trial by jury, and the action is not made referable by anything set up in the answer. (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting. *Stech v. C. F. & I. Co.* 236)

5. Where, therefore, the complaint in an action set forth a cause of action on contract and this was put in issue by the answer, which also set up counterclaims consisting of long accounts, *held* (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting), that an order of reference of all the issues, granted on motion of plaintiff against the objection of defendant, was error. *Id.*

6. The history of legislation upon the subject of set-off and references given. *Id.*

RELIGIOUS CORPORATIONS.

1. Under the act of 1893 (Chap. 498, Laws of 1893, exempting from taxation so much of the real estate of certain religious corporations as is used exclusively for its corporate purposes, which act, by its terms, declares that it "shall take effect immediately," a corporation included in the act is exempt from a tax upon its real estate so used for the year 1893, where the assessment had not been completed, and so placed beyond the power of the taxing officers to change, prior to the time when the act became a law. *People ex rel. v. Comrs. Taxes, etc.* 348

2. Said act became a law on April 29, 1893. All of the real estate of

the relator, a religious corporation in the city of New York, was assessed for that year. *Held*, that, as by the New York Consolidation Act (Chap. 410, Laws of 1882), the books containing the "annual record of the assessed valuation of real and personal estate" remain open until the first day of May, and up to that time the commissioners of assessment and taxation have power to correct them in respect to valuations, the real estate used exclusively by the corporation for its own purposes was exempted from taxation; that the commissioners were authorized and required to remove the entry thereof from the books; and that a mandamus requiring the commissioners to remit the tax assessed thereon was properly granted. *Id.*

REMAINDERS.

The will of C. created trusts for the benefit of her two daughters and two grandchildren named, each trust for the life of the beneficiary. The remainders were given one-half to such of her nephews, and one-half to such of her nieces named as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue to such issue. *Held*, that the remainders were not liable to taxation under the Collateral Inheritance Tax Act of 1885 (Chap. 488, Laws of 1885) until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable, or to others in whose possession it would be exempt, as in case of the death of the nephews or of the nieces named prior to the expiration of the trust the one-half of the remainder would go to the heirs at law of the testatrix; also, that conceding there was upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate. *In re Curtis.* 219

See WILLS.

REMEDIES.

1. An action is not maintainable to set aside an assignment for the benefit of creditors because of a preference exceeding in amount one-third of the assets of the assignor. *Abegg v. Bishop.* 286
2. *It seems* the only remedy is an action, in aid of the assignment and for the benefit of all the creditors, to subject the excess to the claims of creditors under that instrument. *Id.*

RULES.

The rule that where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done, applies only in an emergency; it is a rule of last resort, applicable only where all others fail. *Rapps v. Gottlieb.* 164

SALES.

1. A contract for the sale of several distinct and separate items of property is entire where the promise by the purchaser is made conditional upon entire performance by the vendor. *Ming v. Corbin.* 884
2. In the absence of such a condition and where the price to be paid is apportioned to each item or is left to be implied by law, the contract is severable, and when the purchaser has received and accepted one of the items, it is no defense to an action to recover the purchase price that the other items have not been delivered; he is simply entitled to his damages, if any, because of the non-delivery. *Id.*
3. The right of a vendor to enforce an executory contract for the manufacture and sale of goods will not be forfeited or lost by reason merely of technical, inadvertent or unimportant omissions or defects. While a substantial performance must be shown, a literal compliance as to details which are unimportant is not required. *Miller v. Benjamin.* 613
8. The question as to whether defects or omissions shown are substantial,

or merely unimportant mistakes, is generally one of fact. *Id.*

See JUDICIAL SALES.

SAVINGS BANKS.

See BANKS AND BANKING.

SERVICE (AND PROOF OF).

The service of a general notice of retainer and a general appearance in an action by an attorney for a non-resident defendant is equivalent to personal service of the summons and gives the court jurisdiction of the person of such defendant. *Reed v. Chilson*, 152

SHIPPING.

See DEMURRAGE.

SOCIAL AND RECREATIVE SOCIETIES.

1. Defendant, a club incorporated under the act of 1875 (Chap. 267, Laws of 1875), as amended, and owning a parcel of land for its corporate purposes, sold and conveyed a lot to plaintiff. By the terms of the deed the purchaser became a member of the club and held subject to its rules and regulations. These provided for assessments to be made for purposes specified and for a forfeiture of title in case a member failed to pay an assessment as prescribed. An assessment was made by the board of managers, and upon plaintiff's refusal to pay he was served with a notice that his title and membership would be forfeited, unless at a date specified he appeared before the board and showed cause to the contrary. Plaintiff thereupon brought this action to have the action of the board rescinded, as a cloud on his title, and to restrain the forfeiture. The assessment on its face showed it was made in part for permanent improvements. Plaintiff claimed that no assessments could be made for such purposes. *Held*, that conceding this claim to be correct

there was no cloud on title, as the illegality appeared upon the face of the papers, and the facts the association would be compelled to prove to enforce at law the assessment or forfeiture would themselves show the invalidity. *White-side v. N. C. Assn.* 585

2. By the terms of the plaintiff's deed he was granted "the use of the club house, public grounds, water front," etc. By the by-laws two funds were constituted, one to be "applied exclusively to the purchase, improvement and maintenance of the grounds and other property of the association." The other, into which all assessments were to be paid, was to be appropriated "in the first instance" to current expenses, but it was provided that any surplus at the end of the year should be turned over to the other fund. It was also provided that the board of managers might "from time to time make assessments for other purposes * * * as they shall deem necessary." *Held*, that taking and construing the deed and by-laws together the assessment was valid and enforceable, as prescribed by the by-laws. *Id.*

SOLDIERS.

The provisions of the act of 1884 (Chap. 312, Laws of 1884), as amended in 1887 (Chap. 464, Laws of 1887), giving to honorably discharged Union soldiers and sailors a preference for appointment and employment in all public departments, and imposing upon all public officers having the power of appointment the duty of a faithful compliance with the act, does not abrogate or repeal the power to discharge which existed prior to its passage. *People ex rel. v. Lathrop*. 113

SPECIFIC PERFORMANCE.

- A wife, to secure a loan to her husband, executed to defendant a deed of land owned by her, he executing to the husband a lease of the land, by the terms of which he agreed to convey the land to

the husband by a "good warranty deed and in fee simple," at any time within two years, upon payment of the sum loaned. In an action to compel the execution of such a deed, *held*, that as the deed to defendant was in effect simply a mortgage, the title of the wife was not diverted, and it would be inequitable to compel defendant, in an action to which the wife is not a party, to convey the land to the husband by deed of general warranty; that the scope of the agreement was that defendant, upon payment of the loan, would convey his mortgage interest by deed purporting to convey the land; that he ought not to be compelled to convey with warranty broader in scope than the interest he had; and so, that he should only be required to warrant against his own acts. *Shields v. Russell*. 290

— When specific performance of contract for sale of lands will not be compelled because of defect of title. *See Campbell v. Stokes*. 23

STATE.

1. The legislature has power to pass a general law regulating the compensation of laborers employed by the state, or by officers under its authority which disturbs no vested right or contract. *Clark v. The State*. 101
2. Accordingly, *held*, that the act of 1899 (Chap. 380, Laws of 1899), which took effect in June of that year, regulating the wages of day laborers employed by the state or any officer thereof on public works, was constitutional. *Id.*
3. When the compensation of a laborer is so fixed by statute it cannot be reduced by a state officer under whom a laborer is employed, and the fact that he takes for a time a reduced compensation does not estop him from subsequently claiming the residue. *Id.*

STATE PRISONS.

1. The provisions of the act of 1884 (Chap. 312, Laws of 1884), as

amended in 1887 (Chap. 464, Laws of 1887), giving to honorably discharged Union soldiers and sailors a preference for appointment and employment in all public departments, and imposing upon all public officers having the power of appointment the duty of a faithful compliance with the act, does not abrogate or repeal the power to discharge which existed prior to its passage. *People ex rel. v. Lathrop*. 113

2. Accordingly *held*, that the power given by the Constitution to the agent and warden of a state prison to appoint certain officers thereof, including keepers, gave to the warden the power of removal, and, assuming that the power is subject to legislative regulation, it was not abrogated by said act in the case of an honorably discharged soldier who had been appointed a keeper in a state prison. *Id.*

3. Also *held*, that even if the discretion of the appointing power was limited as to removals by said act, these restrictions were removed by the act of 1889 (Chap. 382, Laws of 1889), which confers power on the agent and warden to appoint and remove keepers. *Id.*

STATUTES.

In construing amendments to a statute the original act with all its amendments must be read together and viewed as one act passed at the same time, and no part of the original or the amendments is to be held inoperative if they can all be made to stand and work together. *Lyon v. Manhattan R. Co.* 298

- Chap. 380, Laws of 1899.
See Clark v. State of New York, 101.
 — Chap. 312, Laws of 1884.
 — Chap. 464, Laws of 1887.
 — Chap. 382, Laws of 1889.
See People ex rel. Griffin v. Lathrop, 113.
 — § 95, chap. 181, Laws of 1885.
See Folmsbee v. City of Amsterdam, 118.
 — 1 R. S. 520, § 99.
 — 2 R. S. 502, § 2.

- *Chap. 811, Laws of 1861.*
 — § 1, tit. 7, *chap. 291, Laws of 1870.*
See Excelsior Brick Co. v. Village of Haverstraw, 146.
 — *Chap. 483, Laws of 1885.*
See In re Curtis, 219.
 — § 61, *chap. 680, Laws of 1892.*
See People ex rel. v. Martin, 228.
 — *Chap. 290, Laws of 1891.*
 — § 68, *chap. 18, Laws of 1892.*
See People ex rel. v. Board of Supervisors, 271.
 — *Chap. 508, Laws of 1887.*
See Abegg v. Bishop, 286.
 — *Chap. 721, Laws of 1893.*
See Lyon v. Man. R. Co., 293.
 — § 83, tit. 8, *chap. 291, Laws of 1870.*
 — *Chap. 870, Laws of 1871.*
 — *Chap. 117, Laws of 1883.*
See People ex rel. v. Mabie, 343.
 — *Chap. 410, Laws of 1882.*
 — *Chap. 493, Laws of 1893.*
See People ex rel. v. Commissioners, 348.
 — 1 R. S. 732, § 105.
See Towler v. Towler, 371.
 — *Chap. 700, Laws of 1881.*
See Lane v. Town of Hancock, 510.
 — *Chap. 267, Laws of 1875.*
See Whiteside v. Noyac Cottage Assn., 585.
 — §§ 118, 180, *chap. 689, Laws of 1892.*
See Elmira Savings Bank v. Davis, 590.

See ACTS OF CONGRESS.
 COLLATERAL INHERITANCE TAX ACT.
 FOREIGN LAWS.
 LIMITATIONS (STATUTE OF).

STAY OF PROCEEDINGS.

Upon motion to set aside an attachment granted, on the ground that defendant was a non-resident, it appeared that plaintiffs brought the action, as assignees of the claim set forth in the complaint; that their assignors had previously brought suit thereon and obtained an attachment, which was vacated on motion, and before the motion costs were paid this action was brought. *Held*, that while plaintiff's assignors were stayed (Code Civ. Pro. § 779), the stay did not render the present action and the proceedings thereon void, and did

not deprive the court of jurisdiction, but only rendered further proceedings irregular; and so did not affect the validity of the attachment; and that it was competent for the court below to deny the motion, in case plaintiffs paid the costs of the former action within twenty days. *Wessels v. Boettcher.* 219

STREETS.

See HIGHWAYS.

SUPERIOR COURT (OF NEW YORK).

As at the time of the ratification of the judiciary article of the State Constitution, which provides that the Superior Court of New York is continued "with the powers and jurisdiction" it then had (§ 12, art. 6), said court had jurisdiction of an action by a resident of the state, although not a resident of the city, against a foreign corporation to recover damages for personal injuries caused by negligence (Code Pro. § 427), said court has now jurisdiction of such an action, notwithstanding the provision of the Code of Civil Procedure (sub. 7, § 263) in reference to the jurisdiction of superior city courts. Any legislation attempting to limit the jurisdiction is unconstitutional. *Flynn v. Centl. R. R. Co. of N. J.* 439

SUPERVISORS (BOARD OF).

1. The board of supervisors of a county entitled to more than one member of assembly, in making an apportionment of assembly districts, are entitled to the exercise of a reasonable discretion. *In re Baird.* 523
2. As under the constitutional limitations forbidding the division of towns in making such an apportionment and requiring each district to be of convenient and contiguous territory, absolute equality of population in the districts is not possible, a slight variation will not warrant or justify

an application to the courts for redress. To authorize this there must be a grave, palpable and unreasonable deviation, so that when the facts are presented, argument will not be necessary to show that such a deviation has been intentionally made. *Id.*

3. The constitutional prohibition against the division of towns in making the apportionment does not apply to wards of a city. A ward, although treated as a town for some purposes of municipal government, is not a town within the meaning of said prohibition, and so, a ward may be divided. *Id.*

4. The fact that in making an apportionment of a county into assembly districts it was not based upon the citizen population, but aliens were included, does not necessarily require that the apportionment should be set aside for that error. The court will not presume a material disproportion in the distribution of aliens throughout the county. *In re Whitney.* 531

SUPREME COURT.

The Supreme Court has no power on appeal to add to a judgment a sum which it finds by the evidence to be due plaintiff, where the question as to what amount is due is one of fact, upon which either party might demand the verdict of a jury. *Dayton v. Parks.* 391

SURROGATE'S COURT.

1. A Surrogate's Court has no jurisdiction to declare a trust and enforce it by decree. *In re Monroe.* 484

2. In proceedings in a Surrogate's Court to remove an administrator, it is the duty of the surrogate to make specific findings of the facts upon which his decree is based; and the duty may not be imposed upon an appellate court of searching the record for facts that should be incorporated in the findings. *Id.*

3. In such proceedings it was charged, and the surrogate found in substance, that the administrator at the time of the death of his intestate, owned certain mortgages covering the real estate of the latter; these he foreclosed after he entered upon the discharge of his duties, and at the sale prevented bidding by promising the creditors that he would bid in the property for the amount of his respective liens, make a private sale thereof and account to the estate for any profits realized; that he did bid in the property, made subsequent private sales, realizing profits for which he refused to account. *Held*, that the Surrogate's Court had no jurisdiction to try those questions; that if the executor was liable to account for the profits a court of equity was alone competent to try the issues presented, and render a binding decree. *Id.*

4. As to whether it was competent for the surrogate to receive the testimony on the theory that the acts of the administrator were hostile to the estate and so he was unfit to continue in office, *quære.* *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TELEPHONES AND TELEPHONE COMPANIES.

An attachment was granted upon an affidavit of plaintiff's attorney; the averments therein were stated to be upon information and belief, the information and grounds of belief being statements of plaintiff, who was in Boston, and his counsel residing there, who (as the affidavit stated) "have both talked to deponent this morning over the telephone from Boston." It was not stated and did not appear that the affiant was acquainted with plaintiff and recognized his voice, or in any other way knew it was the plaintiff who was talking to him. *Held*, that the affidavit was insufficient; that while the necessary information may be communicated by telephone it must appear that the affiant knew the per-

son so communicating with him and recognized the voice, or in some way such person must be identified. *Murphy v. Jack*. 215

TITLE.

See CLOUD ON TITLE.

TOWNS.

1. Under the act of 1881 (Chap. 700, Laws of 1881) transferring the primary responsibility for injuries to persons or property resulting from defects in highways from commissioners of highways to the towns the negligence of the commissioner is still the basis of liability, and a town is now only liable for neglect of its commissioner in a case where he would have been liable had the injury occurred prior to the passage of the act, and where the negligence of the commissioner was such as to render him liable, under the act, to the town for a recovery had against it. To impose the liability it must be shown that the proximate cause of the injury was an omission on the part of the commissioner to use ordinary care under all the circumstances in the performance of his duties, *i. e.*, such care as a reasonable and prudent person would ordinarily have exercised under those circumstances. *Lane v. Town of Hancock*. 510

2. In an action against a town to recover damages for the death of plaintiff's intestate, alleged to have been caused by a defect in one of its highways, these facts appeared: There are about 230 miles of road in the town, eighty of which are along dugways and up steep ravines. The road where the accident occurred passes through a mountainous wooded section, used mainly for drawing heavy loads of lumber and wood, and for a distance of five miles but two or three families live upon it. The road was built about twenty years previously and was properly constructed; it ran along the side of a steep hill with a retaining wall along the lower side, and on top of the wall, guards consisting of logs about sixteen inches in diameter

were placed. The water from a spring on the hillside above was conducted across the road by means of a waterbar and was discharged over the retaining wall. The road at this point, which was at the foot of the hill, was nearly on a level; it had become filled up to the top of the guard, or nearly so; the roadbed was from twelve to fifteen feet wide, and from the upper to the lower side there was a slope of about eighteen inches. The lower wagon track was about four feet from the guards. The road had been in this condition about eight years, and no accident had previously happened. Previous to the accident ice had formed upon the waterbar, and shortly before there had been an extraordinarily severe snow storm. The snow had drifted deeply into the road and was soft from thawing; the lower sleigh track had worn down to a few inches from the guards. The deceased came down the hill on a load of logs on two bobs. The ice and snow caused the rear bob to slide, its lower runner went over the wall, the load was overturned and the deceased killed. *Held*, that the evidence failed to show actionable negligence on the part of the commissioner of highways, and that a refusal to non-suit was error. *Id.*

TRADE MARKS.

1. To bring a case within the rule prohibiting the adoption of a word as a trade mark which is descriptive of the character and composition of the article to which it is applied, it must appear that the word gives some reasonably accurate and distinct knowledge upon those points. *Keasbey v. B. C. Works*. 467
2. Plaintiffs, who were manufacturers of chemical and medicinal preparations, in 1881 began the manufacture of a secret medical preparation of caffeine. To distinguish this preparation from others and to establish a trade mark, plaintiffs devised and affixed to the bottles containing the preparation labels, upon which were printed the words "Bromo-

Caffeine." This label they registered as a trade mark in the patent office, in compliance with statute. The preparation so labeled was extensively advertised by plaintiffs, and they have continued to manufacture and sell the same. Defendants in 1890 began the manufacture of a similar preparation, to which they applied the name of "Bromo-Caffeine," which was affixed to the bottles containing it. In an action to restrain such use of the words as a violation of plaintiffs' trade mark these facts appeared: While the name "Bromo-Caffeine" had been applied in Germany to a chemical compound of no practical utility, and not an article of commerce or generally known, it never had, previous to plaintiffs' adoption of it, been used to designate any medicinal preparation, and there was no identity of substance or nature between the chemical and the medicinal preparation. Plaintiffs' preparation is composed of seven different ingredients, of which bromide of potassium, a compound of bromine and potassium, an alkali, is one, and caffeine is another. There is no free bromine in it. Bromine enters into combination with many different alkalies, and there are a large number of other organic compounds into which it enters. The preparation sold by defendants contained bromide of sodium instead of bromide of potassium. The evidence also disclosed that the word "Bromo" did not necessarily indicate the presence of any bromide. *Held*, that the evidence justified a finding that the words so used by plaintiffs did not impart such information as to the general characteristics of the preparation to which they applied it as to prevent the adoption of them as a trade mark; and that plaintiffs were entitled to the relief sought. *Id.*

TRESPASS.

Where one of several houses belonging to the same owner is so constructed as to require the support of the wall of the adjoining house, and the owner leases the former, the tenant is entitled to that sup-

port, and in case the owner or his grantee removes the wall, he is a trespasser and liable to the tenant for his damages. *Snow v. Pulitzer.* 263

TRIAL.

1. In an action by an attorney to recover compensation for professional services, the court charged in substance that in estimating the value of plaintiff's services, "several circumstances must enter into the computation, *i. e.*, the professional reputation of plaintiff for ability and integrity, the difficulty and importance of the case, the amount of work and labor performed, the amount involved, the pecuniary ability of the client," and after a general discussion of these considerations stated, "the main element after all in determining the value of the lawyer's services is the result," adding, "a charge must be adjusted to the benefit, in a measure at all events."
* * * Undoubtedly a lawyer * * * will not charge as much if his client be unsuccessful.
* * * You must look to the benefit." *Held*, that the charge, taken as a whole, simply conveyed the idea that while the result was an important element to be considered, it was only one of the several elements specified, and so there was no error. *Randall v. Packard.* 47
2. A motion for a new trial was made after judgment for plaintiff, on the ground that he had sworn falsely upon his cross-examination on the trial, in denying he had been disbarred as an attorney. *Held*, that as from the proofs presented on the motion it was a debatable question, admitting of opposing inferences as to whether plaintiff had been actually disbarred, in the legal sense of that word, it could not be said, as matter of law, that he had sworn falsely, and that the decision of the court below denying the motion was not reviewable here. *Id.*
3. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, an apprentice in the employ of de-

defendant, a plumber, who was killed by the caving in of an excavation in which he was at work, the complaint alleged in substance that the deceased, while in the employ of defendant, was directed by him "to go down and do certain work in the excavation" which he had caused to be made, and while therein, following defendant's instructions, the side of the excavation, by reason of its not having been properly constructed by defendant, fell in, causing the death. Defendant's answer simply denied that he directed the decedent to "go down and do certain work in an excavation which this defendant had caused to be made." *Held*, that this was not such a denial as is required by the Code of Civil Procedure to put in issue the averments of the complaint that defendant caused the trench to be made, and directed the deceased to work in it, and while, in the absence of a motion to correct the answer and make it more certain, it might be regarded as good upon appeal, yet, as the whole scope of the answer assumed the fact that defendant made the trench and directed the deceased to work therein, and as a non-suit was granted on the assumption of defendant's negligence, on the grounds of contributory negligence and a release, the point of a failure of evidence to show that defendant did make the trench or direct the deceased to work therein, could not be availed of to support the non-suit. *Stuber v. McEntee*. 200

4. The question as to whether an action is referable without consent of both parties is to be determined from the complaint alone. If the cause of action there set forth is not referable without consent and the same is put in issue, defendant is entitled to trial by jury, and the action is not made referable by anything set up in the answer. (ANDREWS, Ch. J., FINCH and O'BRIEN, JJ., dissenting.) *Steck v. C. F. & I. Co.* 236

5. Where hearsay evidence only is given of a fact at issue in an action, it will not be regarded as sufficient proof of the fact unless

it appears from the course of the trial that it was so received and accepted. *Dayton v. Parke*. 891

6. Plaintiff's complaint alleged in substance the formation of an association by plaintiff and the defendants, manufacturers engaged in the same business, under an agreement which provided that the members were to pay into a common fund a certain sum per pound on all their manufactures, to form a guaranty fund and for other purposes, the share of each party in said fund to be forfeited in case of his expulsion, as provided for; that plaintiff had performed the agreement on his part, but that the association had, in violation of the agreement and without giving him a hearing, found him in default in making payments to said fund, and threatened to expel him. The relief sought was that defendants be restrained from interfering with plaintiff's rights in the association, and from forfeiting its interests in the guaranty fund, etc. The answer denied the alleged unlawful actions on the part of the association, and the evidence was upon the issues so made. Both parties conceded on the trial that the agreement was illegal, because it was a combination to enhance prices, but it did not appear that plaintiff at any time during the trial repudiated or disaffirmed it or claimed to recover back the money paid because of its illegality. *Held*, that the refusal of the trial court to grant plaintiff any relief so far as this action was concerned, because it was proceeding in affirmation, and not in repudiation of the contract, was proper. *P. B. Co. v. K. B. Co.* 425

7. Plaintiff, a grain shoveler, was employed on board a grain elevator lying alongside one of defendant's piers in transferring grain to a car standing on a track. Between that track and the elevator was another track upon which empty cars were standing. Between two of these cars a space was left through which those employed in loading said car passed to and fro. While plaintiff was

passing through this space the empty cars were suddenly forced together and he was injured. In an action to recover damages, the court charged in substance that the rule of law is if a person invites another to come upon his premises, which he controls, "he is responsible for any injury which ensues * * * unless the fact is that the person is negligent himself." *Held*, error. *Flynn v. Centl. R. R. Co. of N. J.*

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8. In an action for false imprisonment plaintiff's testimony was to the following effect: Having a valid claim against defendant she went to his place of business to collect it and asked payment of him. Defendant's father, D., who was a stranger to plaintiff, interposed and addressed her on the subject of the bill. She replied she was not addressing him, but the one who owed the bill. She again asked defendant to pay; he said, nothing. Plaintiff then added, "Well, the only thing I can do is to state the case to the 'World' and see what they can do for me." Thereupon defendant called to D. and whispered to him. The latter directed a person in the office to go for a detective. An officer came and D. directed him to arrest plaintiff, charging her with blackmail, alleging she had come to extort money from him. This plaintiff denied, but she was arrested and taken to a station house where D. preferred a charge against her of blackmail. She was confined over night, and the next day the charge was changed to that of disorderly conduct. She was fined, and on payment of the fine was discharged. Prior to this plaintiff had written to defendant; he came to her house with an officer and said to her if she "bothered him about any bill he would make it pretty hot for her." *Held*, that a jury might have found from the testimony that the act of D. was instigated by defendant, and so, that a nonsuit was error. *Carson v. Dessau.*

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defense set up in his answer, and this burden is not changed by the presentation of evidence which *prima facie* establishes the defense. *Spencer v. C. M. L. Ins. Assn.*

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10. Defendant issued a policy of insurance upon the life of plaintiff's husband; it having lapsed because of non-payment of a premium when due, to procure its re-instatement the insured executed and delivered to defendant an application, dated February 13, 1890, containing a guaranty that he was in sound health, that he had not been sick and had not required the services of a physician since the date of the policy. In an action upon the policy the defense was a breach of said warranty. It appeared that plaintiff in August, 1890, delivered to defendant proofs of the death as required by the policy, consisting of verified answers to questions made by plaintiff and the physician who attended the decedent in his last sickness. Both of the affiants stated in substance that the illness of which the insured died began February 6, 1890; he died May seventh of that year. The proofs of loss were presented in August thereafter. Defendant took no action thereon. Subsequently, and before the commencement of the action, supplementary affidavits of plaintiff, the physician and another were served correcting the statement as to when the last illness commenced, stating it to have been February sixteenth, and explaining the mistake, and on the trial the affiants were sworn and their evidence tended to confirm the statements in the last affidavits. The only evidence upon which defendant relied to show breach of warranty was the statements in the original affidavits. The court charged that plaintiff was entitled to recover unless defendant satisfied the jury, by a preponderance of evidence, that the insured was not in good health at the time of re-instatement, and refused to charge that the burden was on the plaintiff to show good health at that time. *Held*, no error; that as the defense was an affirmative issue interposed by de-

9. The burden of proof is upon a defendant to establish an affirmative

fendant the burden was upon it to establish the same; that the original affidavits raised no estoppel, but were subject to correction, and so it was for the jury to determine whether the defense was established. *Id.*

11. There was a highway in front of defendant's land which had existed since 1804. In 1888 and 1889 it was four rods wide. The highway commissioner of the town, claiming that, as originally laid out, said road was five rods wide, and that it had been encroached upon by the veranda to defendants' house and by their fences, gave them notice to remove the same, and upon their refusal caused them to be removed. Defendants thereupon commenced an action of trespass against plaintiff and others who assisted in the removal, and obtained an order for plaintiff's arrest therein, under which he was arrested and gave bail. Said action resulted in a verdict and judgment for the defendants therein. In an action for malicious prosecution these facts appeared: Defendants had inherited their land from their father; the veranda and fences as they were when removed were there then and had been there for over forty years; defendants had known the highway for many years, had not themselves encroached, and did not know of any encroachment thereon. No claim of any encroachment was made until about 1888. The highway as then fenced out was of the usual width. There was no record of its laying out, and no recorded survey thereof. There was a record of an alteration thereof in 1804, which recited that it was five rods wide, but this defendant had never seen, and in commencing the action of trespass they acted under advice of counsel. *Held*, that plaintiff failed to show want of probable cause, and so a refusal to non-suit was error; that while if want of probable cause had been shown, the fact that an order of arrest was issued would have had a bearing upon the question of malice, it had no bearing upon that of probable cause. *Ferguson v. Arnoir.* 580

12. In an action for libel the complaint averred that plaintiff was of "good character and repute, and enjoyed the respect of her friends and acquaintances and of the community." This was put in issue by the answer. Testimony was offered by plaintiff on the trial to prove her allegations, which was received under objection and exception. *Held*, that in the absence of any disclaimer on the part of defendant when the objection was raised of any purpose of questioning plaintiff's reputation, the reception of the testimony was not error; that while it was unnecessary for plaintiff to make the averment, having done so, and defendant having made an issue thereon, this opened the door for the evidence. *Stafford v. M. J. Ason.* 598

13. Where, in an action for an accounting, the defendants proved a full settlement in regard to the whole transaction, *held*, that the court was not bound to retain the case as against one of the defendants, to enable plaintiff to recover upon a cause of action against him growing out of the settlement, and that the complaint was properly dismissed. *Sherburne v. Taft.* 619

14. Where plaintiff's proof is defective on some point which is capable of being supplied, but no question is raised in reference thereto on the trial, and a verdict is rendered for plaintiff, the court, on appeal, will assume that proof of the omitted fact was waived, or that such fact was conceded. *Bliss v. Sickles.* 647

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. *It seems*, that in the case of a direct trust the Statute of Limitations begins to run when the trust ends, and the trustee has no longer a right to hold the trust fund or property, but is bound to pay it over or transfer it, discharged from the trust. *Gilmore v. Ham.* 1

2. The will of M. directed his executors to divide his residuary estate into as many shares as he had children, and gave, for each child surviving him, one share to the executors to be held in trust for said child for life. Upon the death of the beneficiary the executors were directed to "convey, transfer, pay over and deliver" the share to his or her lawful issue if any survived the parent. In case none survived provision was made for the disposition of such share. All of the testator's children and sixteen grandchildren were living at his death. In an action for partition of lands of an interest in which M. died seized, the grandchildren were not made parties. In an action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit, *held*, that the issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in after-born children, and to be divested by their death before the death of the parent; that the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power. *Campbell v. Stokes*.

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3. Plaintiff was one of two bondholders protected by a trust mortgage. In an action to foreclose the mortgage the complaint set forth the requisite facts to justify a foreclosure, and also alleged that the trustee had left this country, was living abroad and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had departed to join him abroad, and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The complaint was dismissed on the ground that plaintiff could not maintain the action where there

was a competent trustee unless he refused to act, and if he had become incompetent it was necessary first to procure the appointment of a new trustee. *Held*, untenable; and that the facts proved justified the bringing of the action by plaintiff. *Eutlinger v. P. R. & C. Co.* 189

VENDOR AND PURCHASER.

1. The right of a vendor to enforce an executory contract for the manufacture and sale of goods will not be forfeited or lost by reason merely of technical, inadvertent or unimportant omissions of defects. While a substantial performance must be shown, a literal compliance as to details which are unimportant is not required. *Miller v. Benjamin*. 618

2. The question as to whether defects or omissions shown are substantial, or merely unimportant mistakes, is generally one of fact. *Id.*

3. Plaintiff contracted to sell and deliver to defendants a specified quantity of slit steel in monthly installments, to be prepared and slit in special sizes, in accordance with specifications to be given by defendants for each month's delivery, the specifications to refer to numbers given in the contract, which, according to the usages of the trade, designated the weight or thickness of the pieces; these numbers were 27 and 29. In an action to recover damages for a refusal on the part of defendants to continue to perform the contract the defense was that they were excused from further performance by reason of omissions or mistakes on plaintiffs' part in sending heavier steel than was called for. The proof tended to show that it was a fact well known to the trade that it was very difficult, if not impossible, to roll cold steel so as to have a uniform thickness and uniform weight, and that a variation of one number could not be regarded as a departure from the contract; that on two occasions when No. 29 were ordered plaintiffs sent No.

27 for part of the order. These were returned by defendants and plaintiffs promptly sent steel of the proper gauge. It did not appear that the mistake caused any material loss or damage to defendants. *Held*, that the deviation did not, as matter of law, amount to a breach of contract on plaintiffs' part; and that the question was properly submitted to the jury, and a finding in plaintiffs' favor was justified. *Id.*

See SALES.

VESSELS.

See DEMURRAGE.
SHIPPING.

VILLAGES.

1. Under the provision of the Village Incorporation Act (§ 1, tit. 7, chap. 291, Laws of 1870) constituting the board of trustees of a village its commissioners of highways and giving to the board power to discontinue a street, a resolution of the board discontinuing a street is sufficient for that purpose. The provision of the Revised Statutes (2 R. S. 502, § 2) requiring the certificate of twelve freeholders in order to authorize the discontinuance of a highway by commissioners, does not apply to villages incorporated under said act, and the requirement in the act of a petition of freeholders, applies to the opening or altering of a street, not to the discontinuance thereof. *Excelsior Brick Co. v. Village of Haverstraw.* 146

2. The provision of the Revised Statutes (1 R. S. 520, § 99; amended by chap. 311, Laws of 1861) which declares that a highway that has ceased to be travelled or used as such "for six years shall cease to be such for any purpose," applies to streets in villages incorporated under the general act. *Id.*

3. In an action to restrain defendant, a village incorporated under the general law, from interfering

with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, in 1887, after the discontinuance, entered into possession and inclosed the same with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who has since used and occupied the same. *Held*, that as against defendant, plaintiff's possession was a sufficient title to sustain the action. *Id.*

4. The provision of the general act for the incorporation of villages (§ 33, tit. 8, chap. 291, Laws of 1870, as amended by chap. 870, Laws of 1871) which provides that "boards of supervisors of the several counties are hereby authorized and empowered to extend the boundaries of any incorporated village within their respective counties," only applies to villages incorporated under said act, not to those organized under a special charter. *People ex rel. v. Mabie.* 343

WAREHOUSEMEN.

C. shipped a cargo of peas from Kingston, Canada, to Cape Vincent, consigned to a Kingston bank, care of plaintiff, a warehouseman at Cape Vincent. Plaintiff received the cargo and delivered to C. a warehouse receipt stating that the peas were held subject to the order of the consignee. C. drew a draft against the consignment on defendant, which was duly accepted by it under an agreement that it was to have possession of the cargo on payment of the draft, the warehouse receipt to be held meanwhile as security. The draft, with the warehouse receipt attached as security, was discounted by said bank. Defendant, after acceptance and before maturity of the draft, took the cargo from plaintiff's possession without his per-

mission. Defendant having failed to pay the draft, plaintiff paid it, on demand being made by the bank for the cargo, and thereupon the draft with the warehouse receipt was duly transferred to him. *Held*, that plaintiff was entitled to recover of defendant the amount of the draft; that the provisions of the Penal Code (§ 633) forbidding a warehouseman from delivering to another than the holder of a warehouse receipt issued by him, the property covered by it, did not apply. *Burnham v. C. V. Seed Co.* 169

WATERCOURSES.

The duty imposed by the "County Law" of 1892 (§ 68, chap. 18, Laws of 1892) upon the boards of supervisors of two counties divided by navigable tide waters spanned by a bridge on a highway crossing such waters, to keep the same in repair, is mandatory, not discretionary, and when the reparation requires that the bridge shall be re-built, it is the duty of the two boards to re-build it. *People ex rel. v. Bd. Suprs. Queens Co.* 271

WHARVES.

1. Wharfingers do not guarantee the safety of vessels coming to their wharves. They are bound simply to use ordinary care to make the places in front of their wharves reasonably safe for vessels to approach and lie there. *McCaldin v. Parke.* 564

2. Defendants owned a wharf in the East river. Plaintiff's vessel, which had been chartered by defendants, while approaching the wharf to deliver a cargo consigned to them, struck a rock in the bottom of the river about seventy feet from the wharf and was injured. In an action to recover damages it appeared that all the approaches to the wharf were safe, but the one over the rock, and hundreds of vessels had gone to the wharf in safety, in all stages of the tide. A surveyor who had examined and located the rock testified, in substance, that in his judg-

ment it was not part of the bottom of the river, but had fallen there. It also appeared that previous to the accident it had not been heard of and no similar accident had previously happened. Defendants had caused the basin in front of their wharf to be dredged out, and it did not appear that the rock was in the ordinary approach to the wharf, or that defendants had any control of the part of the river where it was, or had any right to remove it. *Held*, that the testimony failed to make out a cause of action. *Id.*

3. Plaintiff claimed that defendants had contracted to give him for the approach of his vessel to the wharf sixteen feet of water. Nothing to that effect was contained in the charter party, and the only evidence was plaintiff's testimony to the effect that when negotiating for the charter party one of the defendants said that they were making arrangements to have their dock dredged out, and would give him sixteen feet of water at all stages of the tide. *Held*, that the evidence failed to show a contract as to the depth of the water; but that what was said was a mere representation, and if made in good faith defendants could be charged only for negligence. *Id.*

4. Also held, that conceding the evidence established a contract, no breach thereof was shown. *Id.*

WILLS.

1. The will of M. directed his executors to divide his residuary estate into as many shares as he had children, and gave, for each child surviving him, one share to the executors to be held in trust for said child for life. Upon the death of the beneficiary the executors were directed to "convey, transfer, pay over and deliver" the share to his or her lawful issue if any survived the parent. In case none survived provision was made for the disposition of such share. All of the testator's children and sixteen grandchildren were living at his death. In an action for partition

- of lands of an interest in which M. died seized, the grandchildren were not made parties. In an action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit, *held*, that the issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in after-born children, and to be divested by their death before the death of the parent; that the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power. *Campbell v. Stokes*. 23
2. Accordingly *held*, that the grandchildren of the testator were necessary parties to the partition suit, and so that plaintiff's title was defective and he was not entitled to enforce his contract. *Id.*
3. The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. In an action to compel specific performance of the contract, *held*, that the power of sale was not given for the benefit of the remaindermen simply, but its chief purpose was the benefit and safety of the life tenant; and so, that the power was not extinguished by the death of M. and the deed of the executrix was sufficient to carry the fee. *Cotton v. Burkelman*. 160
4. The will of C. created trusts for the benefit of her two daughters and two grandchildren named, each trust for the life of the beneficiary. The remainders were given one-half to such of her nephews, and one-half to such of her nieces named as should be living at the time of the successive termination of each trust; if any of them should then be dead leaving issue to such issue. *Held*, that the remainders were not liable to taxation under the Collateral Inheritance Tax Act of 1885 (Chap. 483, Laws of 1885) until the successive termination of each trust; that it could not until then be determined whether the trust fund would pass to persons in whose hands it would be taxable, or to others, in whose possession it would be exempt, as in case of the death of the nephews or of the nieces named prior to the expiration of the trust the one-half of the remainder would go to the heirs at law of the testatrix; also, that conceding there was upon the death of the testatrix, a technical vesting of the remainders in the beneficiaries named, this nominal fee might never become a taxable estate. *In re Curtia*. 219
5. B. died, leaving a widow and two children, a son and a daughter, him surviving. By his will he directed his residuary estate to be divided into three parts. He gave the rents, issues and profits of one part to his wife, of one to his daughter during life, and of the other part to the son until he should reach the age of thirty years, when one-half of said part was given to him absolutely, the other half when he attained the age of forty. In case of the death of the son before his third became vested in him, either in part or wholly, the portion that had not vested was given to his children, if any survived him. The will directed that at the death of the widow the part appropriated to the use of the widow should be divided and one-half thereof added to the daughter's part, the other half to that of the son, each "to be governed and affected in every respect" by the provisions of the will touching the parts of the children respectively "as fully and particularly as if

- such additions had originally constituted portions of said parts." The son died after reaching the age of forty, leaving children. Thereafter the widow died. In an action for the construction of the will, *held*, it was the clear intention of the testator that the son should become vested with one-half of all he was to take under the will at the age of thirty, and with the other half at forty, subject, however, to the life estate of the widow in the one-third set apart for his mother, and so that an assignment by the son of his interest carried with it one-half of that third. *Dimmick v. Patterson*. 322
6. The will of F. empowered his executors, two in number, to sell any of the real estate of which he died seized, and out of the proceeds "which they are to receive as trustees and in trust to pay any debts;" the net residue after payment of all debts he gave to the "executors and the survivor of them as joint tenants." Then followed this clause: "I have entire confidence that they will make such disposition of such residue as under the circumstances, were I alive and to be consulted, they know would meet my approval." But one of the executors qualified; they both as individuals contracted to sell to defendant a portion of the lands of which the testator died seized. *Held*, that plaintiffs did not take title to the real estate as individuals, and as such could not convey title; and so, that defendant was entitled to judgment for a return of the deposit made by him on execution of the contract and a cancellation of the contract. *Forster v. Winfield*. 327
7. The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result. *Stokes v. Weston*. 433.
8. So, also, the law favors the vesting of estates, and in case a will contains apt words to dispose of the testator's entire estate that construction will be given to it. *Id.*
9. The will of S. gave to his wife the use of all his property for life, the remainder to his three children, two sons who were unmarried, and a daughter who was married and had two children. The will then provided that in case of the death of the sons, or either of them, without issue then living, the share of the one so dying should be divided equally between the two grandchildren. In an action for partition of lands of which the testator died seized, and for a construction of the will, *held*, that the death referred to was that of a son during the lifetime of the testator, and as they both survived him, they, with their sister, took the entire estate, subject to the life estate of the widow. *Id.*

WORK AND LABOR.

The result of a lawyer's services is a proper and an important element to be taken into consideration in determining their value. *Randall v. Packard*. 47

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